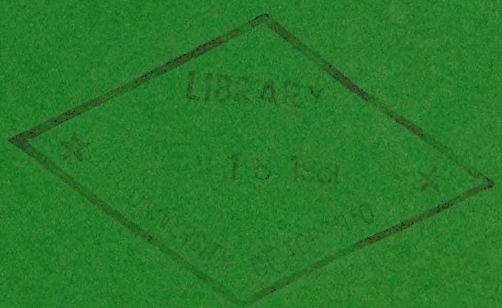
Ontario

the ROYAL COMMISSION on the NORTHERN ENVIRONMENT

THE LEGAL AND ADMINISTRATIVE BASIS OF LAND USE AND ENVIRONMENTAL DECISION-MAKING NORTH OF LATITUDE 50°
A GUIDEBOOK AND SELECTED OBSERVATIONS

Funding Program Report



ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

J.E.J. FAHLGREN, COMMISSIONER

THE LEGAL AND ADMINISTRATIVE BASIS OF LAND USE AND ENVIRONMENTAL DECISION-MAKING NORTH OF LATITUDE 50° - A GUIDEBOOK AND SELECTED OBSERVATIONS

by

Canadian Environmental Law
Research Foundation

John Willms
Joel Vanderwagen
Lynn Beak
with the assistance of
Donald Sinclair
Toby Vigod

March 1980

THIS PUBLICATION HAS BEEN PREPARED WITH THE FINANCIAL ASSISTANCE OF THE ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT'S FUNDING PROGRAM. HOWEVER, NO OPINIONS, POSITIONS OR RECOMMENDATIONS EXPRESSED HEREIN SHOULD BE ATTRIBUTED TO THE COMMISSION; THEY ARE THOSE SOLELY OF THE AUTHOR(S).

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CHAPTER 1

INTRODUCTION

The Royal Commission on the Northern Environment (RCNE) states* that one of its principal objectives is

> To recommend necessary changes in the legislation, administrative structures and processes whereby government decisions about economic and social development and protection of the natural environment in the north are made, considering their appropriateness, effectiveness, co-ordination, clarity and responsiveness.

Focusing on the legal and administrative basis of decision-making with respect to land use and environmental planning in Northern Ontario, this study contributes to the attainment of that objective.

Because the underlying legislation and the administrative and decision-making practices for the area north of 50° are often significantly different from those of the south, it is important that they be understood by those wishing to comment upon and/or influence the policies and plans being developed for that area.

The project team, consisting of a supervising

* Terms of Reference, Objectives, Work Program, Second Edition, July 1979.

lawyer and two researchers working part time over a seven month period, undertook first, to study all provincial legislation relevant to land use and environmental planning in northern Ontario and then to examine the way in which the legislation is interpreted in practice by the various ministries of the Ontario government.

Initial efforts consisted of a review of material in the library of the Royal Commission with careful scrutiny of the transcripts of and briefs submitted to the preliminary hearings of the RCNE.

The next step consisted of interviews with officials of the Ministry of Natural Resources and the Ministry of Housing. It became apparent that, because the majority of the land in Northern Ontario is public land, the planning process there is completely different from that which most people are familiar with under The Planning Act.

Thus began an iterative process, in which each interview introduced a new perspective and additional questions, leading in turn to a review of documents and legislation, and then to more interviews.

Thus, interviews were conducted with staff on many levels of the Ministries of Treasury and Economics, Intergovernmental Affairs, Northern Affairs and Environment, as well as Natural Resources and Housing. At the request of senior ministry officials, only general references are made in this report to the positions of the various ministries, rather than quoting and identifying individuals within them.

Because of the time required to review the basic legislation and to piece together a comprehensive picture of the administrative structures and decision-making processes, the resulting report is more descriptive than analytical in nature.

Chapter 2 establishes the broad constitutional framework for distribution of powers among the various levels and branches of government. It describes the constitutional basis for Provincial ownership of public lands and their natural resources and general land use and environmental planning powers.

Chapter 3 explains the special status of native people and native land with respect to the government of Ontario.

Chapter 4 is a technical synopsis of those provincial statutes most relevant to planning in northern Ontario. It looks at the powers and responsibilities assigned to the various ministries, the kinds of structures and processes established, provisions for participation by affected parties and the general public in the decision-making process, and what avenues of appeal are available to them.

Chapter 5 looks at how these are actually administered in practice. Special attention is given to the administrative and planning programs of the Ministry of Natural Resources, because of their dominant role in the planning and disposition of Crown land.

Chapter 6 takes a closer look at public participation in the MNR planning process. It describes the methods available and evaluates the effectiveness of those actually used.

Chapter 7 turns from the theoretical and general level to an analysis of how the existing system affects individuals. Two cases are presented. The first illustrates problems encountered by two individuals objecting to a decision made under The Public Lands Act. The second illustrates the meaning of due process and the role that a hearing can play in the decision-making process. Attention is given to the practical application of the Environmental Assessment Act to the planning programs of the Ministry of Natural Resources.

From the paper, the reader will be able to identify some of the problems inherent in and concerns arising out of existing legislation and administrative practices. Chapter 8 describes the limitations of the report and identifies aspects of legislation that can be readily changed as well as areas where further research would be required.

Finally, in addition to presenting the authors' perspective on the present state of land use and environmental decision-making, it is hoped that this report will serve as a useful reference for the staff and members of the Royal Commission on the Northern Environment in fulfilling their objectives.

CHAPTER 2

CONSTITUTIONAL PERSPECTIVE

I. INTRODUCTION

An examination of the exercise of decision-making powers is stimulated by a broad understanding of the constitutional basis for such powers. Virtually no limits exist on the areas over which powers may be exercised by the Canadian 'state'. As a corollary, the 'state' is not obliged to exercise authority or power in any given circumstance. It is useful to compare this 'divine right' with the United States system. There, theoretically at least, the 'state' obtains its power from the will of the people who voluntarily submit to being governed. In the Constitution and its amendments, the people have established limitations on the matters over which the state can exercise power and have endowed the state with certain duties to act. These limitations and duties are perceived to be expressions of all important considerations of public interest.

In Canada, we are dependant on the will of the state, as expressed through the appropriate decision-making structures, to exercise or not to exercise powers in any given circumstance.

II. DECISION-MAKING STRUCTURES

Although there are no restrictions on the ambit of 'state' powers in Canada, such powers may only be exercised through decision-making structures determined by the BNA Act[1], certain federal and provincial statutes and tradition. In broad terms, Canada has three levels of government: federal, provincial and municipal. The federal and provincial governments each consist of a legislative, an executive and a judicial branch. Municipal governments have notionally at least, a legislative and an executive branch, with certain 'quasi-judicial' functions grafted onto each. While an understanding of the respective functions of these branches is important, it would be inappropriate to deal at any length with such matters in this paper*.

At Confederation, an attempt was made to allocate the range of 'state' powers between the federal and provincial levels of government, through the British North American Act (BNA Act). Since that time, amendments to the BNA Act, a lengthy and convoluted series of judicial decisions and legislative and administrative practices have substantially fleshed out

* The reader can find elaboration of these concepts in Laskin, Canadian Constitutional Law, c.1; Lyon & Atkey, Canadian Constitutional Law in a Modern Perspective, c.5; McRuer, Royal Commission Inquiry into Civil Rights, Vol. 1, S.1.[2]

and augmented the rather flimsy structure provided in 1867. These state powers are exercised through the passage, implementation, interpretation and enforcement of legislation, regulations and the common law by the branches of government within each level.

Municipal governments exercise only such powers and authority as have been expressly delegated by the province, rather than sharing, ab initio, in a division of powers as did the provincial and federal levels.

The respective rights of ownership of the federal and provincial governments over all public property were also established by the BNA Act, as interpreted by the courts. The significant incidents of ownership are 'use' and 'alientation', and the exercise by governments of these incidents constitutes an important and influential aspect of their behaviour. This is particularly so in the area under study, due to the large degree of public ownership of the land 'north of 50°'.

It is noteworthy that the BNA Act makes no specific reference to matters of planning or environmental conservation. Accordingly, planning and environmental powers are found in the interpretation of other heads of powers, the uses of which have been extended to and have allowed for planning and environmental management and decision-making.

III. PROVINCIAL ROLE - LEGISLATIVE AND REGULATORY JURISDICTION

The powers of the province to legislate and regulate in regard to planning and environmental matters are found in the BNA Act, S.92(13), "Property and Civil Rights in the Province"; S.92(16) "Generally all Matters of a merely Local or Private Nature in the Province"; and S.92(10) "Local Works and Undertakings". Judicial interpretation has established that these heads of power are sufficiently broad and comprehensive to encompass most aspects of land use planning and environmental management.

In practice, the Province of Ontario exercises virtually exclusive legislative control over such matters. Federal government planning and environmental activities are limited to those areas which lie specifically within federal jurisdiction and to more the indirect influences of federal government research and cost sharing programs.

The approach that we are taking is that the Province of Ontario has virtually complete jurisdiction and responsibility to legislate and regulate matters of planning and environmental management. The exceptions to this jurisdiction are few in number and will be enumerated specifically below.

IV. THE PROVINCIAL ROLE - OWNERSHIP

The division of ownership of public property within the Province of Ontario is analogous to the division of legislative power: the province and its municipalities own all of the public resources with certain specific exceptions.

Section 117 states that the provinces shall retain all public property then owned by them. Perhaps redundantly, S.109 provides that the provinces, at the time of Confederation, shall own all the public lands within their boundaries except those lands that were expressly transferred to the Dominion. Section 108 provides a list of specific classes of property which were transferred to the Dominion. These are largely limited to developed transportation facilities, other than public roads, military facilities and other government of Canada buildings.

If there was any doubt as to the extent of ownership conferred in the allocation of lands to the provinces, S.109 further provides that mines, minerals and royalities also belong to the provinces.

The province also has the power to legislate in connection with "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon."

During the first decades following Confederation, the most hotly and frequently contested issues under the BNA Act involved ownership of property. The courts continually assented and gave effect to the concept that the provinces owned all public property within their boundaries other than that specifically granted to the Dominion. Indeed, where the wording that provided for grants of ownership of certain types of property to the Dominion was ambiguous, it was strictly construed in favour of the provinces. Perhaps the most striking and significant decision of this nature construed the phrase "Rivers and Lake Improvements" (S.108, Third Schedule) to mean improvements only to both rivers and lakes. Consequently, unimproved portions of rivers were left in provincial ownership.[3]

The same case dealt with the ownership of fisheries. Although the federal government was granted legislative jurisdiction over "Sea-Coast and Inland Fisheries" (S.91(12), in establishing the proprietary right of the province to lakes and rivers, the Privy Council ruled that the province holds the proprietary right to fisheries located in such lakes and rivers.

Wild life inhabiting Crown land is also the property of the province.

Although the province owns the lands reserved to Indians, the Indians have usufructuary title. This gives the Indians full use of and dominion over their lands for as long as their bands exist. This, combined with the federal legislative power over Indian lands (S.91(24) deprives the province of administration and control over those lands. This creates a special situation and set of problems, which will be discussed in more detail in Chapter 3.

The ownership of public property, along with S.92(5) which specifically allows for "The Management and Sale of the Public Lands..." gives the province sweeping powers over most of the area north of 50°. The ownership of lands by the province does not, in itself, exclude the exercise of federal legislative and regulatory authority, where such authority is being exercised in relation to the specific exceptions to provincial jurisdiction.

Federal legislative powers over provincial property have been limited, however, to clear exercises of specific heads of federal power which do not curtail the proprietary rights of the province. For example, the federal jurisdiction to legislate with regards to inland and coastal fisheries does not allow the federal government to implement a system of fishing licences which grant more or less exclusive rights to fishing in any given area. The licensing power belongs to the province.

Detailed regulations providing the mode of fishing, the nature of the instruments to be used, times and places when and where fishing is permitted and persons who may fish are all within provincial jurisdiction and therefore valid.

In another case, it was held that S.92(5) (the management and sale powers) allowed the province to require that timber cut from Crown lands should be manufactured in Canada, even though such regulation would seem to infringe on the Dominion legislative power over trade and commerce (S.91(2))[4].

It would appear therefore, that the provincial ownership of resources confers virtually complete management and regulation of these resources. Even where a specific head of federal power exists for example regarding fisheries, the right of ownership gives the province considerable scope to regulate.

Which branch of government must deal with provincial property? The Supreme Court of Canada has ruled that provincial legislative power over its property includes the power of administration and control by the executive branch.[5] Accordingly, a provincial government may, without legislation, deal with its property as a private owner. It may grant land by lease or licence, attach any

restrictions to such grants and, probably, sell to private individuals and the federal government.[6] In practice, the disposition of provincial lands is generally authorized by acts of the legislature which specifically delegate to the executive branch the power to sell lands subject to certain limited restrictions as to maximum parcel size, consideration and use.

V. THE FEDERAL ROLE - LEGISLATION

Exceptions to the provincial jurisdiction over matters of planning and environmental management are found in specific powers allocated under S.91 of the BNA Act and in the general power to legislate for the "Peace, Order and Good Government of Canada" (also S.91).

Section 91(10) gives the federal government power over navigation and shipping. This power extends to any navigable rivers and prevents any interference with navigation by an exercise of provincial jurisdiction.

This situation is not entirely clear cut either. In a recent case, the Ontario Court of Appeal ruled that a municipality could, through zoning, stop the use of a wharf, which was constructed under a permit from the federal government required by and issued under the Navigable Waters Protection Act.[7]

The "Trade and Commerce" (S.91(2)) power and the use of federal taxation powers to encourage or discourage certain practices or processes gives the federal government, notionally at least, some jurisdiction over planning and environmental management. There has been no indication in the submissions to the Royal Commission that these powers are significantly effecting trends in the use of land north of 50°.

As noted above, the federal government, under S.91(12) has jurisdiction over "Sea-Coast and Inland Fisheries". Since protection of fisheries usually requires the maintenance of a high standard of water quality, this power does give the federal government considerable jurisdiction over water quality management. It also allows the federal government to prescribe the manner of fishing and the time and place where it may be allowed. Due to the overlapping of jurisdiction the federal government has enacted limited legislation only under this head of power, largely relating to the maintenance of water quality. The administration of the legislation has, by agreement with the Province of Ontario, been delegated to the province. Accordingly, the federal government has no significant presence north of 50° in this regard.

Section 91(24) gives the Dominion the right to legislate respecting "Indians and the Lands Reserved for the Indians".

The general "Peace, Order and Good Government" power allows the Dominion legislature to exercise control over matters not specifically enumerated in the BNA Act and the regulation of which is in the national interest. In particular, the federal government has assumed the jurisdiction over aeronautics, atomic energy and energy transportation (pipelines). The courts have fully supported such legislation.

The control over aeronautics is virtually complete. For example, a federal decision to permit or establish an airport will supersede municipal planning decisions to the contrary.[8] In connection with atomic energy, the federal power to regulate is wide ranging, but it does not deprive the province of its normal regulatory and proprietary jurisdiction over mining of uranium.

The National Energy Board exercizes approval functions regarding pipeline construction. This Board receives and evaluates evidence of environmental impact, as well as other relevant factors.

Environmental Assessment Review Process

The federal government has established, by regulation, an informed environmental assessment process. Submission of proposals to this process by other government departments or agencies is voluntary. To date, most projects assessed have been major Crown corporation or private sector undertakings which require federal approvals under other legislation, rather than undertakings of actual government departments.

This procedure could be significant in application to pipeline proposals and development associated with the mining and/or refining of uranium.

VI. FEDERAL ROLE - OWNERSHIP

The limited ownership of property by the Dominion in the Province of Ontario has been noted above as an exception to the provincial property rights. Other than those exceptions, there are virtually no situations of federal ownership of property 'north of 50°'.

VII. MUNICIPAL ROLES

As noted above, the municipalities derive their legislative and executive powers through delegation by the province.

The Planning Act delegates planning power to municipalities. The delegation is not unconditional but, rather is closely supervised by the executive branch of the province - the Ministry of Housing and the Ontario Municipal Board.

A very small portion of the land area 'north of 50°' is within the boundaries of incorporated municipalities. Over most of the area, therefore, the province retains full planning powers.

In their ability to provide the services for development, municipalities exercise an indirect planning and environmental power. Even in municipal territories, however, the province may also establish basic sewage treatment and water supply services. Consequently, municipal jurisdiction is not exclusive in this regard either.

VIII. CONCLUSION

The combination of sweeping legislative powers and rights of ownership give the Province of Ontario comprehensive planning and environmental powers 'north of 50°'. These powers are subject only to certain specific exceptions in favour of the Dominion.

Due to the limited area under the jurisdiction of incorporated municipalities, the municipal role 'north of 50°' is relatively small, although significant to the residents of the municipalities that exist.

Consequently, the balance of this paper will deal virtually exclusively with the exercise of planning and environmental powers by the Province of Ontario.

FOOTNOTES

Chapter 2

[1]30 and 31 Vict., c.3 (Imp.).

[2]Laskin, Bora, Canadian Constitutional Law, 4th ed. by Albert S. Abel (Toronto: Carswell, 1973).

Lyon, J. Noel and Atkey, Ronald G., ed., Canadian Constitutional Law in a Modern Perspective (Toronto: Univeristy of Toronto Press, 1970).

Royal Commission Inquiry into Civil Rights, Honourable James C. McRuer, Chairman (Toronto: Queen's Printer, 1969).

[3]Attorney-General of Canada v. Attorney General of Ontario [1898] H.C. 700

[4]Smylie v. R. (1900), 27 O.A.R. 172

[5]R. v. Robertson (1882), 6 S.C.R. 52 p.136

[6]Ibid., see also La Forest, Gerard V. Natural Resources and Public Property under the Canadian Constitution. Toronto: University of Toronto Press, 1969.

[7]Township of Moore v. Hamilton (1979), 23 O.R. (2d) 418.

[8]Johanneson v. West St. Paul, [1952] 1 S.C.R. 292.

CHAPTER 3

NATIVE LANDS AND LEGISLATION

More than half of the people living north of 50° are Indian. They live on reserve lands, in small communities distributed throughout the vast unorganized areas of the north, and in the few towns.

Until the early 1900's, Indian people had occupied and used this land, and their rights, based upon this traditional use, were recognized by the doctrine of aboriginal title.

However, since the early 1900's treaties have been negotiated and these rights surrendered in exchange for treaty rights. Currently, rights over the reserve lands are defined by the Indian Act and rights over Crown land are limited by the treaties.

Thus, a study of land-use and environmental planning in the north cannot be complete without examining the legal application of Provincial policies and plans to the native people, and the means available to them, in turn, to influence decisions affecting their interests.

The material in this section describes the history of native legislation in Canada, treaties signed in northern Ontario, The Indian Act - with particular regard for land-use

provisions, and other legislation dealing with natural resources located on reserve land.

I. HISTORY OF NATIVE LEGISLATION

When Indians first came in contact with Europeans, their friendship was actively pursued for the purpose of securing peace alliances. These alliances, or Treaties as they are called, were negotiated as early as 1693.

Until 1830, Indian matters were administered by the British Indian Department which was a branch of the Military. In 1844 the administration was transferred to the Province of Canada and away from the imperial authorities in England.

Two statutes were passed in 1850, the first being An Act for the Better Protection of the Lands and Property of Indians in Lower Canada. Under this legislation a Commissioner was established with power to hold the Indians' lands in trust for Indian people. The second statute was An Act for the Better Protection of Indians in Upper Canada from Imposition, and the Property Occupied by them from Trespass and Injury. Pursuant to this statute, no one could deal with Indian lands unless the Crown approved, and such lands were exempt from taxation, judgment and seizure.

All of the above-mentioned features have been retained in the present day Indian Act, demonstrating the consistency of the government's attitude towards Indian lands since the 1850's.

In 1867, the British North American Act was passed by the British Parliament and in section 91(24) "Indians and Lands reserved for the Indians" were made exclusive heads of jurisdiction reserved for the federal government, which meant that only the federal House of Commons could pass legislation in relation to Indians or lands reserved for Indians.

At that time also Indian Affairs administration was transferred from the Commissioner to the Secretary of State and legislation proliferated.

In 1876, an Indian Act was passed to consolidate all previous legislation. For the next 70 years this Act remained in force, subject to frequent amendments.

Then in 1947 and 1948, a Joint Committee of the Senate and House was set up to review the legislation. It concluded that the past policy of assimilation had not worked effectively and that Indians needed further assistance to advance themselves from wardship to full citizenship. A new Indian Act was passed in 1951 which increased the application of provincial laws to Indians through the introduction of section 87 (now 88). The purpose of this change was to reduce the disparity between Indian status and that of the rest of society.

The effect of section 88 was to provide that all provincial laws of general application would apply to Indians unless the laws were in conflict with Indian treaties, the Indian Act or other federal legislation. It was clear however, that in conflict situations, federal laws would override provincial laws.

The Indian Act of 1951 is still in force at the present time, subject to minor amendments. Following a storm of protest resulting from the federal government's 1969 Policy Statement advocating the abolition of the Department of Indian Affairs and the repeal of the Indian Act in its entirety, a Joint Cabinet and National Indian Brotherhood Committee was established to determine ways to amend the Indian Act to provide for the future needs of Indians. To date, no concrete proposals have resulted, and the Department of Indian Affairs and Northern Development continues to administer the 1951 Indian Act.

The only significant change since then is the 1960 amendment to the Election Act, which removes from the Act the clause excluding Indians, thus granting to Indians who have retained their status, the right to vote in federal elections. Ontario had removed their exclusion clause in the 1950's.

II. TREATIES

The British doctrine of "aboriginal rights" recognized and gave effect to the native peoples' personal usufructuary right to the land which they had occupied in the past. The Privy Council, in the St. Catherine's Milling case gave an analysis of the character of aboriginal title:

> It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacited from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was...considered as vested.
>
> ((1889) 14 App. Cas. 46 at 54 (P.C.))

Britain's history had been one of signing treaties with indigenous peoples to allow peaceful entry into the lands occupied by the native peoples for purposes of trade and settlement. The legal nature of these treaties has not been determined, but they have elements of both simple contracts and international treaties, as negotiated between equal sovereign nations.

History

The first treaties were entered into very early in Canada's history. One of the first was negotiated between the British government and the Eastern Indians at Fort William Henry in Pemmaguid in 1693. This area around the Merrimack River in the Maritimes was one of the earliest areas of settlement.

MAP OF TREATY AREAS*

Treaty 9

The treaties that cover the area north of 50° in Ontario are of much later origin. On the attached map it can be seen that Treaty 9 blankets the vast majority of the land north of 50°. It was negotiated and signed by the Cree and Ojibway of the area in 1905-1906, with later adhesions in the furthermost north in 1929 and 1930.

As is stated in the report of the Treaty Commissioners dated November 6, 1905, which accompanies Treaty 9, the reason

* Peter A. Cumming, ed. Indian-Eskimo Association of Canada, Native Rights in Canada, (sec. ed. 1977).

for negotiation was "increasing settlement activity in mining and railway construction in that large section of the province of Ontario north of the height of land and south of the Albany River (which) rendered it advisable to extinguish the Indian title".

The terms of Treaty 9 were similar to the terms of most treaties negotiated in that the Indian's rights of hunting, fishing, and trapping were retained and a certain amount of land was allocated to each family.

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families; and the location of the said reserves having been arranged between His Majesty's commissioners and the chiefs and headmen, as described in the schedule of reserves hereto attached, the boundaries thereof to be hereafter surveyed and defined, the said reserves when confirmed shall be held and administered by His Majesty for the benefit of the Indians free of all claims, liens, or trusts by Ontario.

The rights to hunt and fish were those considered most important to the native peoples who participated in the treaty process. As the Treaty Commissioners reported:

> Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy.
>
> On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter over among themselves, and then asked to be given till the following day to prepare their reply. This request was at once acceded to and the meeting adjourned.

Breaches of Treaty Rights

Where the rights promised in treaties have not been adhered to by the federal government, Indians have been successful in suing the government in its capacity as ordinary trustee. (Henry v. R. (1905), 9 Ex. C.R. 417)

However where the rights confirmed in the treaties have been breached by federal legislation, the courts have been unwilling to interfere. Since this has been the most common method of breaching the terms of the treaties, the Indians have had little success in fighting the restriction of their rights.

Hunting and Fishing Rights

Where the government has enacted federal hunting and fishing legislation such as the Migratory Birds Convention Act, which have prohibited the hunting of migratory birds except in a specified season, the legislation has been held

applicable to Indians hunting out of season on unoccupied Crown land. (R.v. George, [1966] S.C.R. 267) Even though the courts have lamented this incongruity they have not given treaties equal status to federal legislation.

Other Breaches

Even the Indian Act itself contains breaches of treaty rights. Section 35 of the Indian Act gives the provincial government, municipalities and corporations the right to expropriate reserve land for public purposes, even though some of the treaties promise that reserve land will only be taken with the consent of the Band Council.

Provincial Legislation

In terms of provincial legislation, section 88 of the Indian Act, ensures that no provincial legislation shall apply to Indians if it contradicts the terms of a treaty. Therefore, provincial legislation has not had a serious effect upon treaty rights.

Indian Land Claims

Although the provincial government takes the position that all the land in Ontario is blanketed by treaties and that there is no land which is still held by the Indians under the doctrine of aboriginal title, there are several actions based on Indian land claims which are pending in the courts. Therefore the question of whether all land in Ontario has been

surrendered by treaty is unresolved and will not be resolved in the near future.

One such claim is that of the Bear Island Band. Their land is located around Temagami, on the borderline between Treaty 9 and the Robinson-Huron Treaty, and neither treaty was signed by the Chief of the Bear Island Band. The Band claims that they still have aboriginal title to the land, and is asking the court for a declaration to that effect. The Ontario government is claiming that the Band's rights were surrendered by treaty and that another Chief signed on their behalf. The government is asking for a declaration that the Band has no aboriginal rights to the land, and that the lis pendens (freeze on the sale) entered by the Band be lifted.

The Temagami claim may be one of the most important land claims to be determined in Ontario because of the value and extent of the land involved - the Band is claiming title to almost 100 Townships in the Temagami area.

Although land claims based on exclusion from treaties may be important for individual Bands, most of the land in Ontario clearly was surrendered. The Indian movement as a whole is focusing upon having the treaties renegotiated. Although this would be a means of increasing their rights to surrendered land, neither the federal nor provincial governments have proven willing to consider such renegotiation.

III. THE INDIAN ACT

The Indian Act defines the term "Indian" and governs their lives and the use of reserve land. Native people who are not defined as Indians by reason of their enfranchisement still retain their Treaty rights, because these flow from their status and connection with a particular tribe rather than from any provision of the Indian Act.

Definitions Under the Act

In order to facilitate a better understanding of Indian legal status in Canada, selected sections of the Indian Act relevant to this report are discussed below:

Indian:

In section 2(1) of the act;

> "Indian means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."

Thus the word Indian is a legal description of a status which is defined by the Indian Act. In sections 11 and 12 those people entitled and not entitled to be registered are described; those who are entitled to be registered are those who are members of recognized Bands and the children of those members, and those who are not entitled are those people who have been allotted half-breed script; who have become enfranchised and those women who have married anyone other than a status Indian.

Although this is a simplification of these complex sections the essential elements of registration can be seen.

Band:

Also in section 2(1) of the Act;

Band means a body of Indians
a) for whose use and benefit in common, lands....have been set apart....
b) for whose use and benefit in common, moneys are held by Her Majesty, or
c) declared by the Governor in Council to be a band for the purpose of this Act.

Bands are the legal equivalent of the communal tribal groupings in which the majority of North American inhabitants lived prior to European settlement. Each Band is required to keep a Band list containing the name and number of all Indians who are members. Bands are the basic organizations of Indian government and the method of electing the Council of the Band or the Chief of the Band is set out in the Act.

Reserve:

Although the placement of reserves is determined by treaty or by negotiation with the federal government, reserve lands are administered by the Act.

Reserve means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band

(Indian Act s.2(1))

Therefore neither the Band nor the individual Indian owns the land but has rights of possession and use, and the title to the land rests in the Crown.

Certificates of Possession, which allow band members to become lawfully in possession of land in a reserve are issued by the Band Council and approved by the Minister of Indian Affairs pursuant to sections 20 to 27 of the Act.

Reserve lands are exempt from seizure under legal process, and Indians in legal possession of that land cannot deal with their interest in it, even upon death, without the consent of the Band Council or the Minister of Indian Affairs.

Reserve land required for any public purpose by the provincial government, a municipal or local authority or a corporation may be taken without the consent of the Band Council, since only the consent of the Governor is Council is required. This expropriation-like power is governed by the relevant federal or provincial enabling legislation. (Indian Act s.35) Any compensation goes to the Band as a whole.

The Minister of Indian Affairs is given the power to control the use of reserve land for many purposes, such as agricultural cultivation and the sale of timber and gravel, however the consent of the Band Council is generally required. (Indian Act s.57-60)

Surrendered Land:

> Surrendered land means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty,

> that has been released or surrendered by the band for whose use and benefit it was aside.
>
> (Indian Act s.2(1))

The principle for surrendering land reserved for Indians was first set out in the Royal Proclamation of 1763 which provided that no private person was to be allowed to purchase from the Indians any lands reserved for the said Indians without leave of the British government. This principle of protecting Indians from pressures for the sale of their land has been carried through in the Canadian legislation.

In the past, there have been many allegations of coerced and improper surrenders. However in the 1924 Canada - Ontario Lands Agreement the governments agreed to confirm all existing dispositions of surrendered land regardless of the decisions made by the Privy Council in several appeals which were then under consideration by that court. Since that time, the procedures in the Indian Act have been more carefully followed.

The current section 39 requires that the surrender of reserve lands be to the Crown, be assented to by a majority of the eligible Band members and be accepted by the Governor in Council. The lands that are voluntarily disposed of by the Band can be made the subject of a conditional or unconditional lease, licence or letters patent by the Crown.

Effect of Surrendering Reserve Land

The 1940 U.K. Union Act transferred the beneficial interest in Crown land to the provinces, which retained this interest pursuant to the British North American Act, sections 109 and 117. Although the BNA Act gave the federal government the power to legislate over Indians and Indian lands (s.91 (24)), the provincial Crown title is paramount to and underlies the Indian title. When reserve land is surrendered, expropriated or otherwise disposed of, the land becomes subject to the rights of the provincial Crown. Therefore, although the federal government has the power to accept a surrender of Indian title, the benefits flow to the provincial Crown.

In Ontario, the federal and provincial governments came to an Agreement in 1924, which set out how their interests in reserve lands and, in particular, mineral rights, were to be divided. See following the section on the 1924 Canada - Ontario Lands Agreement.

Federal Government as Trustee

Many of the powers given to the Minister of Indian Affairs reflect the government's view that Indians were unable to make many normal decisions for themselves. For example, Indian Affairs approves all wills (s.45) and the Indian Act gives rules for distribution on an intestacy (s.48). The expenditure of capital and revenue Indian moneys is controlled

by the Governor in Council. (ss. 61-66)

There are restrictions against anyone trading with the Indians without a licence, (s.91, 92) and an absolute ban on mortgaging, charging, pledging, distraining or executing against real or personal property of an Indian or band situated on a reserve except when the security has been issued in favour of another Indian (s.89). This ban prevents Indians from participating in the commercial credit arrangements by which most major purchases are now financed.

In consideration of these powers given to the Minister by statute and the nature of the treaties signed, the government has been held to be a trustee of Indian lands and moneys. For example, as early as 1905, when Indians sued the federal government over obligations in their treaty, the government was held to be an ordinary trustee (Henry v. R. (1905), 9 Ex. C.R. 417). Furthermore, when the Six Nation Indians sued the Crown, seeking compensation for flooding, the Crown was held to be in breach of trust in the management of the Indian funds. (Miller v. R., [1950] S.C.R. 168)

The trust concept is highly developed in the U.S. Indian rights area, and is gaining importance in Canada. The Indian position is that there be no constitutional amendment to remove this trust relationship without their concurrence.

Enfranchisement - Individual

Indians may lose their special status under the Indian

Act and become ordinary citizens of Canada either voluntarily or by statute.

Voluntary enfranchisement is initiated by application and upon a report of the Minister stating that the Indian is of 21 years; is capable of assuming the duties and responsibilities of citizenship; and, upon enfranchisement, will be capable of supporting himself and his dependents, the Governor-in Council may declare the Indian and all his or her dependants to be enfranchised (Indian Act s.109).

If the Band Council is in agreement, any land of which the enfranchised Indian was in lawful possession may be granted or sold to him or her and cease to be reserve land. Generally, Indians who are actually living on reserves do not enfranchise, the Band Councils do not allow reserve land to be enfranchised. Instead, the Indian's interest will be sold to another Indian on the reserve.

Pursuant to section 109 of the Indian Act, when an Indian woman marries a person who is not an Indian, the Governor in Council may by order declare that the woman and all her dependants, even children born of a previous marriage, to be enfranchised. Due to severe criticism of this section, both the Liberal and Conservative Ministers of Indian Affairs have made promises that it will be amended, although no change has taken place to date.

In addition, in the Indian Act of 1920, Indians who were considered "fit" were automatically enfranchised.

However this amendment was short-lived.

Now that Indians have gained the right to vote, the impetus to enfranchise is limited and the growing awareness of their identity as "native peoples" have resulted in a reduced number of enfranchisements in the last decades.

The effects of enfranchisement are numerous. The individual is no longer subject to the terms of the Indian Act; can no longer enter onto the reserve, or even be buried there; will receive a final lump sum treaty payment of a few hundred dollars; will no longer qualify for entitlement to any Indian service programs administered by the federal government; and, if the enfranchised person, is male, will disenfranchise automatically, any status Indian women to whom he becomes married.

Enfranchisement - Band

An entire Band may apply for enfranchisement pursuant to section 112, and where the Minister reports that the Band is capable of managing its own affairs as a municipality or part of a municipality and submits a plan for the disposal or division of Band funds and reserve lands, the Governor in Council may declare that the Band is enfranchised, and may declare that the reserve lands and Band funds be disposed of or distributed to the Band members individually.

The Band must agree to the enfranchisement at a meeting called for that purpose by a majority of the electors present.

There has only been one Band in Ontario enfranchised under this section, and all their reserve land was enfranchised with them. The Band was located in southern Ontario.

Application of Provincial Laws

In 1951, when the current Indian Act was introduced, a section was included for the first time, to make Indians subject to provincial laws. Because of the importance of section 88, it will be reproduced in full.

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The test for the application of provincial legislation within a reserve is the same as with respect to its application within the province as a whole; that is, it must be within the authority of s.92 of the BNA Act (subjects assigned exclusively to the provincial Parliament) and must not be in relation to a subject assigned exclusively to the Canadian Parliament under section 91 of the Act; and further, within a reserve, such legislation must not conflict with the terms of a treaty or with the Indian Act or regulations made under that Act; nor may it provide for any matter provided for or under the Indian Act; nor may it conflict with any other Act of the Parliament

of Canada.

Therefore provincial legislation respecting Indians qua Indians is ultra vires the legislature, but Indians living off the reserve are subject to general provincial regulatory legislation that does not conflict with an Indian treaty.

The area in which most litigation has occured is that of hunting and fishing rights. The right to hunt and fish over reserve land, unoccupied Crown land and land to which they have been given a right of access has been preserved in almost all treaties in Canada, and certainly those in Northern Ontario.

The case law in this area has held that the terms of the treaties override the general provincial wildlife and game laws, and operate to protect Indians hunting on unoccupied Crown land whether or not they live on reserves, as long as such Crown land is within their treaty area.

However, where Crown land is occupied, treaty rights of hunting, trapping and fishing are lost. Case law has held that the creation of a wilderness park, being for the purpose of protecting fish and wildlife, has been one method of occupying Crown land, but the setting out of a timber preserve, being for the purpose of regenerating the trees, has not had the effect of designating the land as occupied. Therefore, Indians may not hunt trap or fish in wilderness

parks but may do so, unrestricted, in forest preserves located within their treaty area.

Provincial laws may become applicable to Indians where the Indian Act so provides. Section 6 of the Regulation 959 Consol. Regs. of Canada 1978 requires that people driving on reserves must comply with all provincial traffic laws in force.

Provincial laws are also becoming increasingly applicable on reserves in areas not covered by the federal legislation. For example, labour relations laws have been applied to Indians working on reserves, and the Ontario Partition and Sale Act has been held applicable to homes on a reserve, subject only to the restriction that the home can only be sold to other Indians otherwise entitled to occupy that reserve. The trend in the courts has been to impose provincial legislation in areas where the field has not otherwise been covered.

The Indians oppose the encroachment of provincial laws on the reserves, because this may be at odds with the trust relationship between themselves and the federal government. They oppose the delegation of s.91 powers since the federal government is delegating its responsibility

Land Use Planning

Municipal-type powers such as land use planning and zoning are found in section 81 of the Indian Act, which states that:

> The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely: ...
>
> (f) the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works;
>
> (g) the dividing of the reserve of a portion thereof into zones and the prohibition of the construction of maintenance of any class of buildings of the carrying on of any class of business, trade of calling in any such zone;
>
> (h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of hte band; and
>
> (i) the survey and allotment of reserve lands among the members of the band... and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60.

Section 60(1) states that:

> The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

The Band Council may make by-laws governing the placement of roads, the zoning of land for certain purposes and the regulation of construction and use of buildings, as long as those by-laws do not conflict with any section of the Indian Act, and can do broader planning for the setting apart of reserve land for common use, if such power has been given to the band by the Governor in Council. These by-laws

will take precedence over provincial planning law, if the province should attempt to plan on reserves.

However in regard to planning on unoccupied Crown land, that power is given to the Ministry of Natural Resources under its general mandate as custodian of public land. Specific powers of disposition are given to it by The Public Lands Act, and the Indians who use the land for hunting and fishing have only the same voice in the use of that land as do any other residents of Ontario.

IV. NATURAL RESOURCES

The natural resources of northern Ontario provided an important impetus for the signing of the treaties, and this has remained an important focus due to the fact that natural resource extraction is the principal economic base of the North.

Control over natural resources on treaty land and surrendered land has been consistently denied to native people in Ontario. In other areas, native people have negotiated for and received a percentage of resource revenue in exchange for the granting of rights to their land. Two examples of such settlements are the Alaska Settlement negotiated between the United States government and the Indians, Inuit and Aleut of Alaska, and the James Bay Settlement negotiated between the Cree Indians of Quebec and the federal and provincial governments.

On reserve land, the situation is not significantly better. The Indian Act, the Indian Oil and Gas Act and the Canada - Ontario Lands Agreement govern in relation to non-metallic substances and timber, oil and gas, and mineral rights located on or in reserve land.

Non Metallic Substances (Indian Act)

Section 58(4) (b) of the Indian Act states that:

> the Minister may, without a surrender,... with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances upon or under lands in a reserve...and the proceeds of such transactions shall be credited to band funds...

Under this section, no surrender of reserve land is required in order to dispose of non-metallic substances, and all the revenue received from the disposition of such substances is held by the Minister of Indian Affairs for the use and benefit of the Band.

Timber (Indian Act)

Timber can be used on the reserve by the Indians subject only to Band Council by-laws concerning land use, but if anyone wishes to remove timber from the reserve they require the written consent of the Minister or his representative to do so. (S.93)

Again all revenue received from the sale of timber is held by the Minister of Indian Affairs for the use and benefit of the Band.

Oil and Gas (Indian Oil and Gas Act)

The Indian Oil and Gas Act was enacted in 1974, and is administered by the Department of Indian Affairs and Northern Development. It provides that royalties shall be paid to Indians when oil or gas is produced on reserve land.

The Act provides that any grants, leases, permits, licences or other dispositions with regard to oil and gas on Indian lands shall be amended to contain, or shall contain within them, the proviso that all royalties obtained shall be held in trust by Her Majesty for the benefit of the Indian Bands concerned, thereby ensuring retroactivity of the legislation.

Indian lands, as defined in section 2 refer to "lands reserved for the Indians, including any interests therein, surrendered in accordance with the Indian Act", therefore royalties are received whether or not the land has been surrendered. This is the only area in which revenues are held for the Bands even though land was surrendered.

Section 8 of the Act requires the Minister of Indian Affairs to consult, on a continuing basis, with representatives of the Indian Bands most directly affected by this Act. It also confirms tha rights of Indian people to negotiate for oil and gas benefits in those areas in which land claims have not been settled.

Minerals (Canada - Ontario Lands Agreement)

Paragraphs 3 and 5 of the 1924 joint federal-provincial Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands, generally known as the Canada - Ontario Lands Agreement, relates to the rights of licenced prospectors to operate on reserve lands.

> 3. Any person authorized under the laws of the Province of Ontario to enter upon land for the purpose of prospecting for minerals thereupon shall be permitted to prospect for minerals in any Indian Reserve upon obtaining permission to do so from the Indian Agent for such Reserve and upon complying with such conditions as may be attached to such permission, and may stake out a mining claim or claims on such Reserve.
>
> 5. The rules governing the mode of staking and the size and number of mining claims in force from time to time in the Province of Ontario or in the part thereof within which any Indian Reserve lies shall apply to the staking of mining claims on any such Reserve, but the staking of a mining claim upon any Indian Reserve shall confer no rights upon the person by whom such claim is staked except such as may be attached to such staking by the Indian Act or other law relating to the disposition of Indian Lands.

These paragraphs were intended to ensure that reserve land would be prospected in the same manner as other land in Ontario.

Paragraph 6 of the Canada - Ontario Lands Agreement of 1924 goes on to state that any consideration received directly or indirectly for mineral rights shall be shared equally between the federal and provincial governments, and the federal portion shall be applied to the benefit of the Band involved. Therefore only half of the revenues received from mineral exploration will be received by the Bands.

In their submission to the Royal Commission on the Northern Environment, presented at Timmins, November 27, 1977, the Garden River Indian Band criticized the 1924 Canada - Ontario Lands Agreement because it was negotiated and signed without native participation of any kind; because half of the royalties and other revenues from the disposition of minerals on an Indian Reserve accrue to the Provincial Government; and because it retroactively validates all surrenders of reserve lands, several of which were in dispute at the time of the negotiations.

The terms of the Agreement can be summarized as follows:

> The current arrangements between Ontario and the Federal Government were settled in a 1924 federal-provincial agreement. Although it did not actually convey title to the reserve lands, its provisions make the question of title academic. The agreement covers all reserve lands situated in Ontario and provides that:

(1) The Federal Government is empowered upon a surrender by the Indians to sell or dispose of reserve lands and apply the proceeds for the purposes of the band;

(2) If a band becomes extinct or if lands are no longer required for the use of a band, the land reverts to the province of Ontario;

(3) The Federal Government may deal with mineral rights to reserve lands, but the Government revenue (sale price, rents or royalties) from mineral exploitation shall be shared by the Federal Government and the provincial government (with a variant rule for Treaty No. 3 under the 1902 agreement).

V. CONCLUSION

This section has described the legal status of native people in Canada, their legal relationship to the province of Ontario, and the extent of their rights over natural resources on reserves and unoccupied Crown land.

Even on reserve land, Indian control is limited. Although they may use the timber located there for their own purposes, they are not allowed to sell if off the reserves without the consent of the Minister of Indian Affairs. Nor does their occupation of the land give them control over subsurface mineral wealth. Although they may hunt and fish without restriction on the reserves, such areas are usually too small to make a significant contribution to their needs.

The Crown tracts over which their treaties give them hunting and fishing rights are gradually diminishing as the land is occupied. Although there is some dispute as to the meaning of the term 'occupied Crown land,' even where the land is not legally 'occupied,' resource extraction activities can significantly affect the wildlife populations. For example, there are four reserves located within the area of the Reed Paper Proposal. Given the fragile nature of the ecology north of 50°, it is understandable that the Indians fear disruption of their livelihood and lifestyle if the undertaking proceeds.

Thus, Provincial policies and plans for the use of Crown land often conflict with the Indians' perception of their own interests. Although it is not within the scope of this paper to further explore the complex and often volatile nature of specific issues, it is hoped that this brief background will provide an additional perspective on the material to follow.

CHAPTER 4

PROVINCIAL STATUTES AND REGULATIONS

I. INTRODUCTION

Under the constitutional allocation of legislative powers and proprietary rights, the Province of Ontario exercises most of the significant planning and environmental powers north of 50°. The executive branch of government is most directly involved in administering these powers, under legislation which confers certain powers, duties and responsibilities and provides procedures regulating and limiting the exercise of such powers.

The legislature itself has had little impact on the establishment of substantive policies, goals, and objectives. Legislative priorities are established in the broadest and vaguest terms, in the assignment of responsibilities and powers to Ministers of the Crown; the hierarchy of application of statutes, which may conflict; choice of specific subject matters deemed appropriate for legislative control, and in the degrees of responsibility, obligation and power conferred on the administering agency.

The selection of statutes discussed in this chapter has been limited to those of greatest significance north of 50°. Three criteria were used:

- legislation of particular application to publicly owned property, especially Crown lands, including administration, management and disposition;

- legislation which is actually utilized by the executive as a basis for decisions affecting land use planning and the environment north of 50°;

- legislation which is not now extensively utilized but which is potentially useful dealing with the geographical realities and limitations of the area "north of 50°".

Statutes will be described in a relatively legalistic terms. A subsequent chapter will deal with the actual practices of the executive branch, as provided for by this legislation or otherwise.

The analysis has been organized around the functional units of the executive branch, the ministries. Two types of statute are described: legislation establishing each ministry and assigning powers and duties; and legislation

concerning specific subject matters. The responsibility for the administration and enforcement of any given statute is generally assigned to a particular ministry or ministries, and, in certain enforcement and decision-making aspects, to the courts or to statutory tribunals.

II. MINISTRY OF TREASURY AND ECONOMICS

MINISTRY OF TREASURY AND ECONOMICS ACT, 1978, S.O. 1978, c. 62.

> 3. The Minister shall collaborate with the ministers having charge of the other departments of the public service of Ontario, with the ministers having charge of the departments of the public service of Canada and of other provinces, with municipal councils, with agricultural, industrial, labour, mining, trade and other associations and organizations and with public and private enterprises with a view to stimulating business, increasing production, extending trade and formulating plans to create, assist, develop and maintain productive employment and to develop the human and material resources of Ontario, and to that end shall co-ordinate the work and functions of the departments of the public service of Ontario.

THE DEPARTMENT OF COMMERCE AND DEVELOPMENT ACT, S.O. 1960-61, c. 18.

> (2a) The Treasurer is responsible for the formulation of policy with respect to land use planning by the Province and the municipalities and has the direction and control of the administration of the law relating thereto.

THE MINISTRY OF TREASURY, ECONOMICS AND INTERGOVERNMENTAL AFFAIRS AMENDMENT ACT, 1973 (No. 2), S.O. 1973, c. 169.

The sweeping planning powers contained in these two acts (establishing predecessors to this ministry) have been removed from the latest reorganization statute, The Ministry of Treasury and Economics Act, 1978. Nonetheless, this ministry claims overriding economic planning responsibility and does retain, theoretically at least, the responsibility for the administration of the Ontario Planning and Development Act. (The Act has yet to be applied in any area of Ontario.)

Ontario Regulation 57/76, for the takeover by the Minister of Housing of certain duties of the Minister under The Planning Act, stipulated:

> (3) the said transfer of administration of The Planning Act and the exercise of the powers and duties therein by the Minister of Housing shall be subject to the responsibility for the formulation of policy with respect to land use planning by the Province by the Treasurer of Ontario and Minister of Economics and Intergovernmental Affairs.

ONTARIO PLANNING AND DEVELOPMENT ACT, 1973, S.O. 1973, c. 52 as amended

This act gives the Minister broad powers to establish 'development planning areas' for any area of land in Ontario and to prepare a proposed 'development plan' and submit same

to Cabinet for approval (s.2).

Where the Minister establishes a development area, he must investigate and survey the "environmental, physical, social and economic conditions in relation to the development of the planning area..." (s. 2(2)).

A development plan may contain

(a) policies for the economic, social and physical development of the area covered by the plan in respect of,

(i) the general distribution and density of population,

(ii) the general location of industry and commerce, the identification of major land use areas and the provision of major parks and open space and the policies in regard to the acquisition of lands,

(iii) the management of land and water resources,

(iv) the control of all forms of pollution of the natural environment,

(v) the general location and development of major servicing, communication and transportation systems,

(vi) the development and maintenance of education, cultural, recreational, health and other social facilities, and

(vii) such other matters as are, in the opinion of the Minister, advisable;

(b) policies relating to the financing and programming of public development projects and capital works;

(c) policies to co-ordinate planning and development among municipalities within an area or within separate areas, defined by the Minister; and

(d) such policies as are, in the opinion of the Minister, advisable for the implementation of the plan.

The Act provides for a fairly intensive public participation process. The Minister must:

- establish two 'advisory committees' one "broadly representative of the people of the development planning area" and one representing the municipalities "to advise and make recommendations" (s. 3);

- ensure that municipalities within and abutting the planning area are "consulted" with respect to the proposed contents of such plans (s. 4);

- publish notice of the proposed plan in local papers,

- make copies available and invite comments (s. 6(1));

- appoint hearing officers to receive representations respecting the contents of the plan (s. 6(2)); and,

- at the hearing, "present the proposed development and the justification therefor and shall make available for public inspection research material, reports, plans and the like..." (s. 6(5)).

The planning process established by this legislation has never been used. Nonetheless, the Act provides a model of a planning process which could be useful north of 50°, and is certainly superior to the ad hoc and variable process used by the MNR today.

The Act has been used as a precedent for other similar specific planning legislation - The Parkway Belt Planning and Development Act (1973) and The Niagara Escarpment Planning and Development Act (1973). The Parkway Belt Plan is completed and approved; the public hearing portion of the Niagara Escarpment planning process is about to begin. To date, these Acts have provided a useful approach to planning in areas where there are strong and divergent views and values, both public and private, to be reconciled.

III. MINISTRY OF NORTHERN AFFAIRS

This Ministry was first established in 1977 by the Ministry of Northern Affairs Act, 1977, S.O. 1977, c. 21

It is the function of the Ministry to co-cordinate the activities of and initiate policies and programs for the Government in Northern Ontario, including,

(a) preparing and recommending Government plans, policies and priorities for Northern Ontario;

(b) establishing and administering ministry programs and co-ordinating Government programs and services relating to Northern Ontario;

(c) advising and participating in the planning and financing of Government programs, services and activities in Northern Ontario provided by other ministries;

(d) improving the accessibility of the programs, services and activities of the Government of Ontario to the residents of Northern Ontario;

(e) making recommendations regarding priorities for research of social and economic conditions of all ares of Northern Ontario;

(f) administering such other programs and performing such other duties as are assigned to it by an Act of the Lieutenant Governor in Council. - s. 8

Upon the recommendation of the Minister, the Lieutenant Governor in Council may establish programs for the benefit of the residents of Northern Ontario.

A program may determine conditions for grants and assistance and conditions under which services are provided by the Ministry and expenses allowed. - s. 10

"Northern Ontario" is not defined.

The Ministry Act assigns no responsibility for any specific legislation.

The recently enacted Local Services Board Act, S.O. 1978, c. 82 gives the ministry powers to establish and supervise quasi-municipal organizations for the purpose of administering basic services normally provided by an incorporated municipality, in areas without municipal organization.

IV. MINISTRY OF INTERGOVERNMENTAL AFFAIRS

5.(1) The Minister is responsible for making recommendations to the Executive Council on the programs and activities of the Government of Ontario and its agencies in relation to federal-provincial, inter-provincial and international affairs.

(2) The Minister is responsible for the policies of the Government of Ontario in relation to municipalities and without limiting the generality of the foregoing is responsible for,

(a) advising the Executive Council as to the organization, function and structure of municipal institutions;

(b) exercising the powers conferred on the Ministry in any general or special Act in relation to the administration of municipalities; and,

(c) co-ordinating programs of financial assistance to municipalities.

(3) The Lieutenant Governor in Council may, on the recommendation of the Minister, make orders establishing procedures to

achieve the objectives set out in subsections 1 and 2 and, without limiting the generality of the foregoing, such orders may provide for procedures respecting the execution, by the Government of Ontario, of agreements of classes of agreements with other governments.

(4) The Minister is responsible for the administration of this Act, the Acts set out in the Schedule and the Acts that are assigned to him by the Legislature or by the Lieutenant Governor in Council.

The Ministry of Intergovernmental Affairs Act, 1978, S.O. 1978, c. 64.

V. MINISTRY OF NATURAL RESOURCES

This ministry was first established under its present name in 1972 (The Ministry of Natural Resources Act, 1972, S.O. 1972, c. 4).

Surprisingly, the Ministry Act does not assign any specific functions to the ministry or the Minister; nor does it provide for the administration by the Ministry of any statutes.

About 52 statutes regarding specific subject matters do provide a partial or exclusive role for the MNR. (See list in Appendix D).

The statutes which MNR uses most in the area north of 50° will be discussed in this chapter.

THE PUBLIC LANDS ACT, R.S.O. 1970, c. 380, as amended.

Approximately 90% of the 1060000 km^2 in the province of Ontario is public land in the ownership of the province.

> The Minister shall have charge of the management, sale and disposition of the public lands and forests. - s. 2
>
> The powers conferred on the Minister by this Act shall be exercised subject to the regulations and they may also be exercised by the Lieutenant Governor in Council. - s. 9
>
> The Lieutenant Governor in Council may make such regulations as he considers necessary to carry out the provisions of this Act, or to meet cases for which no provision is made by this Act. - s. 8 (underlining added)

The Public Lands Act is therefore extremely important. Consequently it is analyzed in some detail, both here and in Appendix E. In this chapter, a functional approach has been used.

Unfortunately, the various sections of the Act appear to have been drafted separately at different times, to meet different situations, and loosely compiled in one statute, apparently for the convenience of the Minister and his officials, but certainly not out of any impulse to make the Act understandable and useful to the affected public.

There is no express policy or criteria provided to guide the ministry or inform the public of government priorities. As will be discussed below, the provisions of the Act cannot be understood by reading it - reference must be had to the actual practices of the MNR.

Planning Process

The draughtsman did not set out to create a policy document. Nonetheless, certain sections do create planning policies.

If the public lands make up 25% or more of the total frontage on a water body then at least 25% of the total frontage shall be reserved for public recreation and access. If public lands make up less than 25% of the total frontage then all public lands on that water body shall be reserved for public recreation and access. (s. 3)

Some provision is made for planning for agriculture. Under section 48, there shall be a Public Agricultural Lands Committee which is to recommend areas suitable for sale or other disposition for agricultural purposes, and measures for their development; and to consider applications to acquire these lands for agricultural purposes in any such area. The Minister can designate lands recommended by the Committee as being suitable for disposition for agricultural purposes

and set about to sell them or otherwise dispose of them at his own prices, rentals, and conditions. Section 48(5) notes that every agreement, licence and letters patent for lands sold or other wise disposed of under this section shall contain a condition that the land is to be used for agricultural purposes.

Under section 64, if the land is patented or otherwise disposed of after April 12, 1917, there is a condition that all ores removed shall be treated and refined in Canada. Default results in reversion of the lands to the Crown. Cabinet can exempt any lands from this provision.

Zoning Powers

The Minister has the considerable authority, under various sections, to exercise land use control or development control powers. Unfortunately, but in character with MNR legislation generally, these sections are devoid of any guidance as to the appropriate circumstances for or manner of exercise of these powers. The confusion is heightened by the dazzling variety of devices available to the ministry.

The Minister has the power, under different sections and vastly different mechanisms and terminology, to control land uses when lands are publicly owned; when they are in the process of disposition; and when they are privately owned.

Land use control on publicly owned land may be exercised anywhere; controls on privately owned land , only in areas without municipal organization.

Under section 16, the only section which actually uses the term 'zone', the Minister may designate areas of public lands as "Open, Deferred, Closed, or otherwise as he considers proper", and may set out the purposes for which each zone may be "administered".

The Minister may exercise zoning and development control powers over private as well as public lands under section 17, which allows him to designate any area in a territory without municipal organization as a "restricted area and...issue permits for the erection of buildings or structures or the making of improvements on lands in any area under such terms and conditions in any case as he considers proper;".

Currently there are 7 areas in Ontario north of latitude 50° which are being administered under a section 17 order, and 11 areas in Northern Ontario as a whole. A section 17 order simply designates lands as a restricted area, but the MNR often develops zoning standards such as lot sizes and setback requirements modelled after typical municipal zoning by-laws to provide consistency in application of development control.

Lastly, there are several techniques of controlling land use on disposition:

- Cabinet may make regulations "prohibiting or regulating and controlling the sale or lease of public lands for any specified purpose or use...", and these may be applicable to any particular area (s. 18);

- the Minister may attach conditions to sales or leases of lands that land "...is or is not to be used in a particular manner". These conditions are deemed to run with the land (s. 21);

- the Minister may also issue licences of occupation and attach conditions thereto (s. 23)

The sections setting out the zoning powers are needlessly redundant, and confusing in their varying terminology.

There is no provision for appeals of any exercise or refusal to exercise any zoning power for affected land owners or occupiers, let alone for other interested parties or 'ratepayer' or public interest groups.

These sections should be repealed and replaced with a single zoning power, perhaps modelled on the time honoured section 35 and its newer cousin, section 35a, of The Planning Act. Section 32 of The Planning Act also provides a useful model; so does the Ontario Planning and Development Act.

Quaere whether decisions made under these zoning powers would be reviewable under the Judicial Review Procedures Act? Certainly, analagous zoning orders made by the Minister of Housing were struck down for his failure to provide notice to and opportunities for submissions by interested parties. (Re Orangwille Highlands and Attorney-General for Ontario (1975), 8 O.R. (2d) 97, (Div. Crt.))

Subdivision of Land

Section 11 allows the Minister to survey and subdivide public lands and to annul any such survey. If the survey or subdivision has been registered, then annulled, "the Minister shall" register an amended plan. If letters patent have been issued for any land affectd by an annulment they are cancelled and reissued based on the amendment with retroactive effect to the date of the original letters patent.

Under section 72 if public lands are surveyed, subdivided and shown as lots on a plan that is to be deposited or registered under any act and the plan is signed by the onwer within five years of the issue of the letters patent then one-quarter in the area of all the lots shown on the plan becomes the property of the Crown and are public lands within the meaning of this Act upon the depositing, filing or registration of the plan. The Minister can choose his lots by agreement with the owner or he may first select one lot, then the owner may select three lots and so on. Provision is made to allow the Minister to accept a money payment in lieu of one-quarter in area of all the lots on the plan. No plan can be deposited until the Minister has approved it and he may impose such conditions as in his opinion are advisable.

Disposition of Land

Upon reading the Act, without reference to the practices of the MNR, there are three basic techniques and a number of others for disposing of public lands. These are also used in The Mining Act.

Letters patent for land sold grant a fee simple title to the lands. The grantee becomes owner of the land in the normal sense of the term. Certain rights (mineral,

water, timber) may be reserved to the Crown and the patent may contain conditions respecting land use.

Leases, or letters patent for land leased are similar to leases between private persons. They grant use of land for a specified purpose under certain contractual terms.

Licences of occupation grant the right to occupy land, often for a particular use or subject to conditions, for an indefinite period. They may be revoked by the Crown at any time.

All of these forms of disposition allow the grantee exclusive occupation and use of the land, subject to any reservation of timber or mineral rights. Whatever rights in land are granted may be devised, sold, etc., by the grantee, subject to any limitations in the instrument or any regulation.

The Minister may also grant easements for any purpose (s.24). An easement is a right in perpetuity to use anothers' land,or part thereof, for a limited purpose, such as for access, drainage works, power lines, etc. (s. 24).

Cabinet, under section 14 can make free grants of letters patent of up to four hectares (ten acres) for roads,

wharves, market places, jails, court houses, public parks, burying grounds, schools, agricultural exhibits, and other like public purposes. It can make free grants up to 100 acres for model or industrial farms.

Not authorized by statute, but mentioned in Ontario Regulation 246/71, is the device of a land use permit. It appears to allow the use of Crown land for certain limited purposes, for a fee.

Finally, a quit claim may be issued to persons who, themselves and through predecessors, have occupied land for over sixty years. This recognizes a limited form of "squatters' rights" (s. 20).

Water Lots, Powers, Privileges. Section 45, the Minister on his own can grant a lease or license of occupation of any public lands covered with water and, with the approval of Cabinet, he can sell such lands. Both leases and sales, of course, are at such price, terms and conditions as he considers proper. Subject to the approval of Cabinet, the Minister in his discretion may fix the terms and conditions upon which water powers or privileges granted by the Crown and any public lands necessary for the development thereof may be leased or developed (s. 45(a)).

Ontario Regulation 246/71 - The Cabinet may make regulations regarding the terms and procedures to be applied in selling or leasing public lands.

One has been passed respecting the "Sale and Lease of Public Lands" (O. Reg. 246/71, as amended by O. Reg. 551/78).

This regulation is quite limited in its scope. It governs terms of and residency requirements for leasing of public land for private summer resort purposes. It specifies that lands leased must be a lot on a registered plan of subdivision.

No procedures, terms, etc., are specified for leases for commercial resort purposes, or, for that matter, for anything else. The title is also misleading in that sales are not discussed (except that sales of summer resort locations are restricted to Canadian residents).

Other Procedures. The Minister may otherwise sell or lease lands upon such terms and conditions as he considers proper (s. 18).

Unlike most current planning legislation, to gain even a modicum of understanding of the Public Lands Act reference must be had to actual practice. This is particularly true in connection with dispositions of land.

For example, the Act makes many references to the 'sale of land' and to 'land sold'. On its face, it a appears that land is sold by issuing letters patent; that the patent and sale are one.

Only after inquiries are made of the MNR does it become apparent that the full title to land may ultimately be conveyed by letters patent, but not necessarily by a sale. For practice, the MNR "sells" land subject to conditions (say, that a cottage be constructed within two years). Only if the conditions are met will the land be "patented". In its practice of administering the Act, the MNR has developed a meaning for the word 'sale' which is foreign to standard legal parlance. What they call a 'sale' is really an agreement to sell at some time in the future, once certain conditions are met.

If one accepts the unusual use of the word 'sale', the procedure used by MNR does not appear to violate the Public Lands Act. (The validity of the interpretation has not been tested in court).

It seems odd that MNR would not use devices more clearly authorized by the Act to achieve the same end. Surely a lease or licence of occupation, coupled with an option to purchase (under letters patent), subject to conditions precedent would achieve the same result.

As with zoning, the wording of the Public Lands Act, through redundant and confusing mechanisms and terminology, leaves the MNR with maximum flexibility and discretion in the management and disposition of public lands, with no legal accountability to the citizens of Ontario who are affected by MNR decisions.

The Act must be rewritten, to reduce the number of redundant procedures available to the MNR and to provide more guidance from the legislature regarding the appropriate terms and procedures dispositions. Decision respecting the future land use of an area should be strictly separate from, and made before, any decisions to dispose of land in that area. Dispositions must then only be made in conformity with land use policies and zoning.

Environmental Protection

Under section 29, "every person who without ... written consent...throws or deposits or causes to be deposited any material, substance or thing upon public lands whether or not covered with water or ice, or both, is guilty of an offence and on summary conviction is liable to a fine of not more than $500.00."

Under section 47, the Minister and any municipality may enter into agreements respecting the control and management by the municipality of any public lands comprised of beaches or lands covered with water in the municipality or

elsewhere (if the lands are in another municipality that municipality must consent). Such agreement may provide for the granting of leases by the municipality and the sharing of rents therefrom.

Roads

Under section 51, any person can exercise a public right of passage on a road other than a private forest road. (A private forest road is defined as a road occupied under the authority of a document issued under this Act or the regulations.

Under section 53, the Minister may designate a road other than a private forest road as a public forest road. The Regulations Act does not apply to a designated public forest road. (What does this mean?)

Under section 54, a district forester can use his discretion to close a public forest road for such period as he may determine to public travel by any class or classes of the public, with the exception of persons hauling forest products. If he closes such a road, barriers must be erected at either end and at all intersections. The forester can grant a permit for travel on the road subject to such terms and conditions as he considers advisable. Anyone who travels on a closed road and has had reasonable opportunity of knowing that the road has been closed is subject to a fine of not more than $500.00

Under section 56, a private forest road is not open to travel by the public unless the Minister has entered into an agreement with the person who occupies the private forest road under the authority of a document issued under this Act or the regulations. The agreement can open the private forest road to travel by the public generally or to any class or classes of the public as may be agreed upon and such opening can include various terms and conditions. The agreement can provide for cost sharing of construction, reconstruction or maintenance of a private forest road. The road does not become a highway within the meaning of The Highway Traffic Act and the district forester can periodically close the road to travel by the public except for traffic hauling forest products.

Under section 66, every patent, etc., must contain a provision excepting the surface rights in any public or colonization road or highway crossing the land granted. The Minister of course may direct otherwise. Every patent, etc., shall reserve to the Crown such percentage, if any, of the surface rights of the land as the Minister considers necessary for road purposes.

Under section 67, the Crown reserves the right to construct on any land patented, granted, or otherwise disposed of (including mining lands or mining claims) any colonization or other road. This right

exists whether or not stated in the letters patent No compensation is payable. The Crown also has the right to take area for roads, wood, gravel and other materials required for the construction or improvement of any colonization or other road without compensation therefore or for the injury done to the land from which they are taken. But if the letters patent do not include a reservation for this construction activity, compensation is payable as provided by The Expropriations Act. Note that "colonization road" is not defined.

Under section 67(4), if Crown land is sold that includes a portage then anyone using the waterway can continue to use the portage without the permission of or payment to the owner of the lands. Any attempt to obstruct can result in a fine of not more than $100.00.

Under section 68, if the Minister is satisfied that the locality is well served with roads he can make an order releasing and discharging land from any reservation relating to roads mentioned in section 67, upon application of the owner and upon payment of a $25.00 fee. This applies where the lands are in a municipality. Likewise, the Minister can release a reservation of the right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons if the land is in a municipality and if he is of the opinion that the reservation no longer serves the useful purpose or that the release of the reservation is in the public interest.

Public Participation and Due Process

At one time the Act instructed the Minister to appoint an "Advisory Committee" which might, in turn, appoint subcommittees. The Committee's duty was to "advise the Minister upon policy on such matters as the Minister may direct, regard being had to the conservation, development and utilization of the renewable natural resources of Ontario" (s. 6). This is as close to a statement to policy as was ever achieved in the Public Lands Act.

This section was repealed in 1972.

There are currently no provisions for public participation, nor are there any establishing due processes for persons affected by decisions made under the Act.

THE MINING ACT, R.S.O. 1970, c. 274, as amended.

The origins of The Mining Act are found in the General Mining Act of 1869, re-enacted in 1906 as The Mining Act.

Important amendments in 1956, and 1957, added Part VIII and Part IX.

Part VIII provides for the establishment of the office of the Mining Commissioner (now Mining and Lands Commissioner). Part IX, consisting of approximately 500 sections provides a detailed code relating to the employment and safety aspects of the operation of mines. This Part was administered by the Ministry of Labour and was repealed

in 1978, to be replaced by regulations under The Occupational Health and Safety Act, S.O. 1978, c. 83.

The Act is divided into 14 parts, each of which deals with a different aspect of mining. Generally, the purpose of The Mining Act is to grant rights to explore for minerals and to mine and refine same.

As with the Public Lands Act, The Mining Act does not overtly provide for planning and environmental considerations to be taken into account regarding decisions respecting the location of and permission to operate mining and exploration activities. Certain specific criteria are set out in the Act and will be dealt with below.

There are no statements of policy or purpose in the legislation. It would appear that the basic purpose is to safeguard the efforts of those involved in prospecting and mining development while imposing minimal restrictions on their activities, either environmental or otherwise

There are a substantial number of statutes and regulations, both provincial and federal, that, directly or indirectly, affect mining operations. A digest of this legislation may be found in Guide to Legislation Affecting Mining in Ontario, (Hildebrand and Frosh, Ministry of Natural Resources, May 1979). The Wilderness Areas Act and the Provincial Parks Act provide that mining activity cannot occur in certain limited parts of the area north of 50°.

The Environmental Assessment Act may be applied to proposed new mining developments in the future. Under this legislation, the full planning and environmental implications of any particular proposed development must be assessed prior to the granting of any approval. These statutes will be discussed further below.

The Environmental Protection Act and the Ontario Water Resources Act require approval for any activity that will involve the discharge of contaminants into the environment. This legislation does not overtly provide for the use of locational criteria in determining the approval of mining activities. Theoretically, however, a proposed mining activity at a particular location may be unable to comply with the requirements of the Ministry of the Environment at such location.

The general philosophy respecting the planning for, and regulation of mines in Ontario has been that minerals must be taken where they are found and that mineral extraction is an important economic activity of the province and should be encouraged whereever minerals are found. Recently, however, some recognition has been given to potentially competing environmental and planning interests. This has been exemplified in connection with two major projects:

- the expansion of uranium mining at Elliot Lake was made the subject of an inquiry similar to that contemplated under the Environmental Assessment Act by an Order-in-Council and was subjected to hearings by members of the Environmental Assessment Board; and,
- Onakawana Development Limited's proposed lignite strip mine in the James Bay Lowlands has been designated as a private undertaking subject to the Environmental Assessment Act. It is not yet clear whether this development will pass the stage of conjecture.

The remainder of this section will be devoted to an examination of The Mining Act itself.

Administration

> All public lands for mining purposes and for the purposes of the mineral industry and all regulations made with respect to mines or minerals or mining or mining lands or mining rights or the mineral industry shall be administered by the Minister. (s. 7(1))

The Minister or the Deputy Minister has been assigned the function of executing on behalf of the Crown all patents, leases, licenses and agreements. (s. 7(2))

The Cabinet may make regulations for the establishment of roads and waterworks for mining purposes. It also

may regulate "to meet cases that may arise for which no provision is made in this Act, or when [it] considers the provision made to be ambiguous or doubtful" (s. 646(1)).

In "special circumstances" the Minister may issue a license of occupation, lease or patent of mining lands or mining rights on terms and conditions which would otherwise violate The Mining Act (s. 646(2)), underlining added)!

Prospecting

No person may prospect without a license. Any person over 18 years of age is, upon application therefor, entitled to obtain a prospector's license (ss. 24, 25).

Mining Claims

Any licensed prospector may stake a mining claim on any Crown lands, or on any private lands the mineral rights to which have been reserved, subject to certain exceptions (s. 35). Claims are to be approximately 40 acres in extent and shall be recorded (ss. 48-54).

The owner of a claim has the exclusive right to prospect and explore and to develop and operate mines (s. 70). If the property is used for other purposes, the claim may be forfeit (s. 74). Unless at least 200 days work on establishing mining operations is performed within

the five years following the recording of a claim, the claim is forfeit (s. 85).

Leases and Patents

On payment of a nominal sum, the owner of a claim may require the Minister to lease to him the entire claim or the mining rights only, as he prefers. This lease is for 21 years and is renewable at the option of the Minister (s. 104).

Once the holder of a lease produces minerals in substantial quantitities continuously for more than one year, he is entitled to a patent of the lands or mining rights held under the lease (s. 105).

Where the leaseee or owner of mining rights requires surface rights for the purposes of his operation or for the disposal of tailings or other waste, the Minister may lease any such surface rights, again at a nominal rent (s. 106).

Where land is leased for mining purposes, the fishing rights, enjoyment of navigable waters, timber rights, rights to use land for the development of electrical power facilities and roads and other transportation facilities, natural gas and petroleum are reserved (s. 108).

It is to be a condition of every patent that the ores shall be treated and refined in Canada. The Cabinet may exempt any mining operation from this restriction (s. 113).

No criteria are provided for any such exemption.

Exploratory Licenses

The claims system has been the traditional method for dealing with exploratory rights. The Mining Act also provides for the issuance of 'exploratory licenses' for the following activities:

- prospecting for gold, platinum, precious stones or other valuable mineral not in place (i.e. not part of a consolidated underground ore body; placer mining) (s. 125);
- to explore for natural gas and petroleum (s. 121);
- to explore for minerals in paleozoic rock formations north of the 51st parallel of latitude (s. 126);
- in areas where mineral exploration requires the use of high technology equipment (s. 656).

Such licenses may be for areas of up to 64,000 acres in extent. The term of the license shall be three years and certain minimum annual expenditures must be made on exploration. If the licensee finds a "deposit of economic importance", he shall be entitled to lease up to ten percent of the area for which the license was issued.

Impact on Adjoining Lands

A general policy of The Mining Act appears to be that priority over the rights and activities of their neighbours.

Where the surface rights to land inside the claim have been granted by patent or otherwise to a different person, the operator of mining exploration or extraction may nonetheless use the surface, subject to payment of compensation to the owner of the surface rights for "all injury or damage" (ss. 36, 101).

Where a mining operator requires the use of the surface for the disposal of tailings or other wastes or for any other mining purposes, the Minister may lease available surface rights to him (s.s.45, 106). Where the surface rights to land outside the claims have been granted to another, the mining operator may apply to the Mining and Lands Commissioner for rights to use such lands for tailing and waste disposal, to conduct water to or away from the mining operation, to drain or divert any water course, construct dams, construct roadways, railways and and waterways for transportation purposes, transmit electricity, and generally, "to enter upon and use for or in connection with the working of his own mine or quarry". Compensation must be paid (s. 645).

Areas Not Open For Mining

The most significant restrictions on lands which can be the subject of claims, leases, patents, etc., for mining purposes are:

- lands set apart as a "town site" by the Crown, or laid out into "town or village lots on a registered plan" (s. 37);
- upon railway lands (s. 37(c));
- upon roads (s. 37(d));
- where surface rights have been disposed of by the MNR for summer resort purposes, except where the Minister certifies in writing that discovery of valuable minerals has been made (s. 38(c));
- in an Indian reserve (s. 38(c));
- in provincial parks, except as provided by regulation (s. 39);
- land being used for agricultural purposes (s. 40);
- land on which is situated a spring, artificial reservoir, public building, church or cemetary, except by consent of the owner or order of the Mining and Lands Commissioner (s. 40);
- lands withdrawn by order of the Minister from mining and exploration activities (s. 43)

This last exception, giving the Minister the power to withdraw lands appears to be a planning type of power. It does not, however, provide any purpose or criteria for the exercise of this power, nor does it provide for the application by any person for the withdrawal or reopening of any lands.

Refineries

A refinery may not be established without a license or a certificate of exemption. Certificates of exemption may be issued where the refinery is not maintained for recovering gold, platinum, silver or any other precious metal (Part X).

No criteria are provided for the issue of any license or certificate.

The Mining and Lands Commissioner

The office of the Mining and Lands Commissioner has been established to hear and determine any contentious question arising from the application of provisions of the Act. These hearings largely involve disputed staking of mining claims, appeals of decisions made by officers appointed under the Act, or the claims for compensation as mentioned above.

Other sections in the Act provide for the Commissioner to act as a hearing officer to prepare a report

to the Minister to guide the Minister in the exercise of his decision-making powers.

Most decisions of the Commissioner may be appealed to the Divisional Court (s. 163).

Pits and Quarries

Pits and quarries may be established on public lands under the authority of a permit issued under The Mining Act. There are no provisions for notice of application for a permit and no criteria, environmental or otherwise, to be applied to the decision to issue a permit.

The establishment and operation of pits and quarries on private land is regulated in the southern part of the province under the Pits and Quarry Control Act. This Act only applies to such municipalities as designated by regulation. No areas north of 50° have been so designated. Accordingly, there is no specific legislation regulating pits and quarries on private lands.

Proposed amendments to the Pits and Quarries Control Act (Bill 127, 1979) will bring the regulation of pits and quarries on public lands under that Act. The terms of the legislation will not be substantially changed, however, and criteria regarding environmental impact are still missing.

Public Participation

The Mining Act makes no provision for notice to the public of any decisions. Although hearing provisions are contained in the legislation, they are provided for the benefit of the ministry and affected parties, i.e. persons directly economically interested in a decision. A general concern for planning principles or for the environment would not likely establish a sufficient interest to entitle any person to status at hearings held under the provisions of the Act.

THE CROWN TIMBER ACT, R.S.O. 1970, c. 102, as amended.

The Crown Timber Act sets up the rules by which the Crown grants the rights to cut timber from public lands. It makes general provision for forest management and planning.

Recent important amendments (S.O. 1978, c. 51; S.O. 1979, c. 72) have authorized forest management agreements, which are to provide for longer term allocations of timber and for cutting and reforestation practices designed to regenerate timber at the same rate as it is being cut.

Several other statutes, including The Fisheries Act, the Navigable Waters Protection Act, R.S.C. 1970, c. N-19, and The Lakes and Rivers Improvement Act, R.S.O. 1970,

contain sections prohibiting polluting activities associated with logging and processing of timber.

Licences

The mechanism of licensing is used to entitle an operator (licensee) to cut timber on Crown lands and establishes ownership of timber in the licensee at the time timber is cut (s. 2 and s. 10).

The rights to cut are granted exclusively to one licensee for the area licenced (s. 11).

Every licence shall:

- state the total area of the licenced area, with a breakdown between productive and unproductive lands (s. 6); and
- name the species of timber and describe the land upon which such timber may be cut (s. 8).

Every licensee shall:

- pay an annual 'area charge' in respect of the productive lands in the licensed area (meaning "lands that are not rock barrens, muskeg or lands covered with water")(s. 1(k), s. 6(2));
- keep and supply to the Minister such records relating to the quantity of timber cut as are required by the Minister (s. 17);

- pay 'Crown charges' based on the amount of timber cut.

A new form of licence, the 'forest management agreement', has been established by the recent amendments.

Selection of Licensee

> The Minister may offer Crown timber for sale by tender either,
>
> (a) to the public generally; or
>
> (b) to any particular class or group of persons who in his opinion are or may be interested in such timber as a source of supply of raw materials for mills in existence at the time the offer is made. - s. 2(1)

Following the auction, the Minister may grant a licence, subject to Cabinet approval (s. 3(1)).

Criteria for the selection of a licensee are not limited to the amounts of the tenders (s. 2(3)). The assurance that milling facilities are available is important (s. 2(4)).

Forest management agreements may be entered into with any person, subject to Cabinet approval.

The Minister has an unfettered power to grant licences "...as he considers proper" for areas not to exceed 160 acres (s. 2(7)).

Forest Management

There exist a number of methods whereby the ministry can implement forest management and environmental protections ranging from ad hoc short term cutting limitations to long term forestry management plans and agreements.

Discretionary Powers. Where there is no 'annual plan'(see below), the Minister,notwithstanding any licence, 'management plan' or 'operating plan', can limit the cutting of the timber included in any licence in consideration of "best forestry practices"; determine the species and quantities of timber that may be cut by any licensee; and direct that trees be marked to be left standing for the purposes of forest management, watershed protection, fire protection, beauty of landscape, game preserves or game shelters. The Cabinet may cancel or vary the terms of any licence respecting the areas and species to be cut (s. 26).

Annual Plans. The purpose of section 26 is unclear, in light of the provision that every licensee shall, prior to any cutting, submit and obtain approval of an 'annual plan', and may then only cut in accordance with the approved annual plan (s. 25).

The Minister may alter the plan before approving it (s. 25(2)).

Regeneration Agreements.

> The Minister may enter into an agreement with a licensee for the promotion and maintenance of the productivity of the licensed area by establishing, regenerating and tending forests and employing silvicultural cutting systems to regenerate forests. - s. 25(4)

Operating Plans. The Minister may require a licensee to furnish an 'operating plan' showing proposed operations and explaining the purpose for which the cut timber is to be used (s.24(2)). The Minister may approve the plan or alter and approve it, and the licensee must operate in accordance with the approved plan (s.24(3),(4).

Management Plans. The management plan is to consist of an operating plan plus supporting information consisting of a "report, inventory and maps" prepared in accordance with the 'manual'. Its preparation must be supervised by a professional forester (s.1(1) and s.24). The Minister may approve the plan or alter and approve it, and the licencee must operate in accordance with it. (s.24(3),(4)).

Manual of Management Plan Requirements. Subject to Cabinet approval, the Minister may enter into agreements for the cutting and management of timber "on a sustained yield basis," i.e. to "maintain an approximate balance between growth of timber and timber cut".

The agreement must contain standards and procedures for harvesting, regeneration and tending of the areas licensed by the agreement.

Where a forest management agreement is in effect, the other powers of the minister and Cabinet to require plans, and to limit cutting do not apply to the area under agreement.

Licensing of Mills

A licence from the Minister is required to establish and operate a mill. The only criteria in the act is that no licence shall be granted "unless the applicant has, in the opinion of the Minister, a sufficient supply of logs or wood-bolts" (s.45).

Due Process and Public Participation

The only express due process requirement in the act is triggered when the Minister intends to reduce or eliminate an area under licence by disposing of lands under The Public Lands Act (which he has the power to do, notwithstanding the licence). In such event, the licensee must be given 30 days notice and the opportunity to be heard. (s.18(2)).

Despite the extreme implications Crown timber licenses of forest management agreements may have for the ecology and residents of areas subject to licence, no opportunity is provided under The Crown Timber Act for any form of public consultation or hearing.

Recently, some forest management plans have been submitted to environmental assessment.

THE PROVINCIAL PARTS ACT, R.S.O. 1970, c.371, as amended

The Cabinet may, in its discretion, determine the areas of Ontario which shall be provincial parks (s.3(2)) and may classify any provincial park as a natural environmental park, a nature reserve park, a primitive park, a recreational park, a wild river park or otherside (s.5). These terms are not defined in the legislation.

The Minister may define zones within parks. The legislation suggests such terms as "historic zones, multiple use zone, natural zone, primitive zone, recreational zone or otherwise" (s.7(2)). The legislation does not provide for any implementation of planning or zoning, but the Cabinet does have the power through regulations to control land use. (s.19).

Unless stipulated otherwise by regulation, prospecting and mining is prohibited in provincial parks. (s.18).

The Cabinet is given broad powers of regulation of virtually any form of activity in provincial parks. (s.19).

The Minister may appoint advisory committies "as are considered necessary or desirable in connection with the administration of one or more of the provincial parks". (s.6). This is the only opportunity for public participation provided for by the statute. There is absolutely no requirement that the Minister take into account the views of any interest group regarding the planning for and regulation of lands within provincial parks.

As with other legislation giving power to MNR, the sketchy nature of this act and the occassional regulations published thereunder belie the detail of the classification and zoning system which has evolved administratively. The broad powers given to the Minister and the district forester or superintendent in charge of each park allow the ministry to plan for and control activities in provincial parks with no requirement to refer to more broadly held concerns or policies.

THE WILDERNESS AREAS ACT, R.S.O. 1970, c.498, as amended

This act, which is even shorter than the Provincial Parks Act, allows the cabinet to:

> ...set apart any public lands as a wilderness area for the preservation of the area as nearly as may be in its natural state in which research and educational activities may be carried on, for the protection of the flora and fauna, for the improvement of the area, having regards to its historical, aesthetic, scientific or recreational, or for such other purposes as may be prescribed. s. 2

The cabinet may make regulations generally for the care and preservation of the wilderness areas and for regulating land uses. (s.7)

It is difficult to understand what this act really accomplishes, in that:

> Nothing in this Act or in the regulations made under this Act limits or effects the development or utilization of a natural resources in any wilderness area that is more than 260 hectares in size (s.3).

260 hectares is approximately one square mile. Accordingly, the designation of any area larger than one square mile in extent will have virtually no effect if it is otherwise desired to cut timber from or mine the area.

There are no provisions regarding public participation, let alone provisions requiring the MNR to consult with interest groups regarding the designation and management of wilderness areas.

THE WILD RICE HARVESTING ACT, R.S.O. 1970, c.497

This act provides for the issuance of licences to harvest wild rice on public lands. The cabinet may make regulations dividing Ontario into wild rice harvesting areas and generally "to carry out effectively intent and purpose of this act". As usual, the act in fact specifies no particular intent or purpose other than to require a licence to harvest. No reasons or criteria are provided for the designation of wild rice harvesting areas.

The Deputy Minister is in charge of issuing licences. Where he proposes to refuse or cancel a licence, he must instigate a hearing. An appeal lies to the Minister from his decision. Again, no criteria are provided.

As with virtually all MNR legislation, the act

provides no indication of government policy and no mechanisms for the participation of effected individuals or groups in the planning and management of wild rice harvesting.

VI. MINISTRY OF HOUSING; MUNICIPAL PLANNING; THE ONTARIO MUNICIPAL BOARD

It is convenient to discuss municipal planning powers simultaneously with the functions of the Ontario Municipal Board and Ministry of Housing, since they are closely related and interdependent.

THE MINISTRY OF HOUSING ACT, 1973, 20 1973, c.199

The Minister or the Deputy Minister, subject to the direction and control of the Minister, shall,

(a) make appropriate recommendations to the Government of Ontario on policies and objectives on housing and related matters with regard to the short-term and long-term housing needs of the people of Ontario;

(b) make recommendations for the effective co-ordination of all housing and related matters within the Government of Ontario, with a view to ensuring the consistent application of policy;

(c) advise and otherwise assist the Government of Ontario in its dealings with other governments regarding housing and related matters; and

(d) advise and otherwise assist local authorities and other persons involved in local planning and development of housing with regard to realizing the objectives of the Government of Ontario for housing and related matters.

- s.7

> 7a. The Minister, with the approval of the Lieutenant Governor in Council, may take such measures as he considers appropriate to implement any recommendation made under section 7, including entering into agreement for such purpose with any municipality, including a metropolitan, regional or district municipality, or with any other person.
>
> New by S.O. 1974, c.14, s.i.

Although the stated duties relate to housing only, the MOH has in fact taken on the tasks of supervising generally land use planning by municipalities and of exercising certain planning and subdivision control powers over all forms of development. These tasks are largely specified in The Planning Act.

The OMB supervises the municipality in a large number of ways. The most significant to us are:

- zoning by-law and amendment approval and appeal where amendment refused;
- approval of expenditures which must be spread or financed over more than one year,
- approval of annexation applications.

Where requested, the OMB will hold a hearing. The Board also holds hearings to determine matters normally within the jurisdiction of the Minister, where requested to do so; for example:

- approvals of official plans and amendment thereto,
- appeals from ministerial refusals to pass official plan amendments,

- subdivision approvals and conditions thereof.

Municipalities have significant direct and indirect planning and environmental powers, in addition to those specified in The Planning Act. Under Municipal Act, Public Health Act and Environmental Protection Act provisions, they have the ability to pass by-laws for the abatement of most kinds of nuisances. They share control over the provision of hard services with the MOH and the MOE. They share control over all forms of waste disposal with the MOE.

Bear in mind that there are only five small municipalities north of 50°.

THE PLANNING ACT, RSO. 1970, c. 349, as amended

This Act provides comprehensive structures for planning and the implementation of planning; development control; subdivision control and property maintenance.

Since the mechanisms in The Planning Act to achieve those functions have been accurately and thoroughly described and discussed in a number of publications, we refer the reader to them for a review of the structures and procedures of official plans, zoning by-laws, subdivision control and development control:

- Operation of Municipal Planning, Background Paper 2, Planning Act Review Committee, Ministry of Housing, 1977.
- A Detailed Guide to the Existing Planning Act, Planning Act Review Committee, Ministry of Housing, 1977.

- A Guide to the Planning Act, Ministry of Housing, 1977.
- Subject to Approval
- Environment on Trial, Revised Edition, Estrin and Swaigen, Canadian Environmental Law Association, Toronto, 1978

A lengthly review of The Planning Act has culminated in draft amendments. Again, these are discussed in detail in White Paper on The Planning Act, Ministry of Housing, 1978m and in The Planning Act, A Draft for Public Comment, Government of Ontario, 1979.

The aim of this section is to isolate and discuss those parts of the existing and proposed legislation which either apply specifically to territories without municipal organization or which otherwise supplement municipal planning powers.

Planning Areas and Planning Boards

A planning area may be constituted from parts or the whole of one or more municipalities with or without areas from any adjoining unorganized territory, or may be from an area entirely without municipal organization (s.2).

Planning areas are particularly useful in situations where development would otherwise tend to occur in an unplanned fashion in unorganized lands close to a municipal boundary. The inclusion of such lands in a planning area is an important step toward achieving control.

Where a planning area has been established, a planning board shall be appointed. Members are appointed by the municipality involved, or, where no municipal organization exists, by the Minister (ss. 2,3).

Planning boards are charged with a duty to "investigate... physical, social and economic conditions' and to "prepare a plan...suitable for adoption by the municipalities as the official plan". They must "hold public meetings and publish information for the purpose of obtaining the participation and cooperation of the inhabitants..." (s. 12).

Where a planning area is completely unorganized, the Minister exercises the functions normally performed by a municipal council in considering and adopting official plans and official plan amendments (s. 18).

Subdivision Control

Two mechanisms exist to control the subdivision of land. Where more than two or three lots are proposed to be created, a plan of subdivision is required. These are approved by the Minister regardless of their location in Ontario.

Smaller scale subdivisions of land can be achieved in a simpler fashion by the granting of consents by a committee of adjustment appointed by the municipality.

Where no municipality exists, or where a committee of adjustment has not been established, the Minister may exercise the consent function himself (s. 29(1)), or may

delegate consent powers to the planning board (s. 30b). The Minister, the planning board and the district land division Committee have the capacity to enter into subdivision agreements. This is especially useful where it seems appropriate to impose conditions on the granting of a severance.

Zoning Control - Section 32 Orders

The Minister may, on his own initiative, exercise the zoning powers that are conferred on municipalities by s. 35 (s. 32(1)).

- Where an official plan exists, any zoning order must conform (s. 32(4)).

The Minister need not give notice before exercising his zoning powers. Once an order has been made, however, he must "give notice...in such manner as he considers proper" (s. 32(5) no indication given as to who must be notified).

Any person may request amendment or revocation of a s. 32 order, and, if unsatisfied, may get an OMB hearing (ss 7,9-13).

It has been the policy not to utilize section 32 orders for day-to-day planning issues, but rather "only in special circumstances where a particular provincial interest must be protected" (White Paper, supra, s. 7.14).

Proposed Changes - "A Draft for Public Comment"

Although planning boards generally are to be abolished, they will be retained for situations where municipalities wish

to plan jointly, or where planning is desired for an area which is wholly or partly without municipal organization (s. 8,10).

In areas without municipal organization, the planning board will assume the municipal functions of official plan approval and amendment, in place of the Minister (s. 19).

The provision allowing delegation of the Minister's consent function in unorganized territory to a planning board has been removed. If he wants to delegate, he must appoint a district land division committee.

The White Paper recommended that the Minister be permitted to delegate powers for the administration of subdivision approvals, consents and s. 32 orders to joint planning boards having jurisdiction over areas partly without municipal organization (Conclusion 25). This recommendation has not been carried forward into the Draft.

VII. MINISTRY OF THE ENVIRONMENT

Established in 1971, as a successor to the Department of Energy and Resources Management, this Ministry has been given no functions or powers in its enabling legislation.

The Ministry does administer four statutes, as provided by each of them:

- Pesticides Act,
- Ontario Water Resources Act,
- Environmental Protection Act,
- Environmental Assessment Act.

THE PESTICIDES ACT, 1973, S.O. 1973, c.25

Pesticides include herbicides, and 'pest' means any "injurious, noxious or troublesome plant or animal life other than man" (S.1).

No person shall use or sell pesticides without a licence. Some pesticides are considered sufficiently toxic that a permit is required for any given instance of their application by a licenced operator. Others are exempt from the licensing restrictions.

The 'Director' (an officer designated by the Minister) may, where he is concerned that any aspect of the use or handing of a pesticide may be deleterious to the environment, issue a control order to specify techniques of handling or to forbid any specified handling or use of the pesticide.

The Environmental Appeals Board is authorized to hear appeals from determination of the director regarding licences, permits or control orders. No provision is made for a member of the public to appeal the issuance of a licence or permit. It would appear that the PAB is not expected to deal with broad public concerns about any given pesticide situation, but only with rights and behaviour of those licenced or otherwise operating under the act.

The act contemplates extensive use of regulations to prescribe classes of licences and of pesticides and generally to set out rules for the use, handling, storage, etc. of pesticides, Regulation 618/74, as amended, was made by the Cabinet for those purposes.

THE ENVIRONMENTAL PROTECTION ACT, 1971, S.O. 1971, c.86 as amended and THE ONTARIO WATER RESOURCES ACT, R.S.O. 1970, c.332, as amended

These statutes are similar in function and structure and would, but for historical background, have been integrated. The OWRA was originally passed as The Ontario Water Resources Commission Act in 1956. The OWRC was disbanded and the duty to administer the OWRA transferred to the MOE in 1972.

The thrust of both acts is the same - to prevent damage to the natural environment by the discharge into the

natural environment of pollutants. The OWRA goes somewhat further as well, in regulating the taking of water from ground or surface water sources and the provision of water treatment facilities.

Pollution Control

Both statutes contain a general prohibition against the discharge of polluting material (OWRA, S.32), where it may impair the quality of any water (OWRA, S.32), or contaminant in excess of amounts allowed by regulation (EPA, S.5); or where it would in any event cause or be likely to cause impairment of the quality of the natural environment, damage to property or plant or animal life or adverse effects on any person (EPA, S.14).

Where a contaminant is discharged in excess of the quantity prescribed in the regulation, or generally out of the normal course of events, the culprit must report forthwith to the Ministry (EPA, S.13 and S.15).

Where pollution is occurring or has occurred the Ministry may summarily seek a court order prohibiting the activity (OWRA, S.31) or issue a stop order (EPA, S.7) or control order (EPA, S.6) and may order repair of any injury or damage (EPA, S.17).

Certificates of Approval

Both pieces of legislation use the 'Certificate of Approval' technique. Certificates of approval or permits are required and may be issued by the 'Director' (an officer appointed by the Minister) for the following:

- construction or extension of any facility from which a contaminant may be emitted (EPA, S.8);
- change of any process so that discharge characteristics will change (EPA, S.8);
- establishment, alteration or extension of any waste management system or disposal site (EPA, S.28);
- establishment, alteration or extension of any sewage treatment works (EPA, S.57 or OWRA, S.42). This is the best example of an arbitrary division of functions between the statutes. The EPA applies to smaller, cesspool or septic tank type systems; the OWRA to the rest;
- taking of water from any surface or ground water supply at a rate in excess of 10,000 gallons per day (OWRA, S.37).

Control Orders and Stop Orders

Under the EPA, Part IV, the Director may issue a stop order, directing any person to cease emitting or discharging a contaminant, or a control order, directing any person to limit the rate of emission of a contaminant and to instal equipment designed to control the emission of contaminants.

Program Approvals

Under S.10-12 of the EPA, a person responsible for a source of contaminant may submit a program to prevent or control the emission of same to the environment.

This procedure has been extensively used by the MOE in attempts to negotiate with industry to obtain clean-ups of polluting operations. The threat of control orders and prosectuions is said to be influential in assisting the MOE in obtaining reasonable abatement programs.

Standard Setting

Unless specific standards have been set limiting the discharge of any particular contaminant, any judgment regarding the harmfulness of such contaminant at any given concentrations in any particular circumstance, will be subjective and difficult of proof, leaving significant determinations to be made at the discretion of ministry officials and at their peril.

To date regulations have only been made to establish air emission standards for ferrous foundries (O. Reg. 11/70); general air contaminant standards and ambient air quality material (O. Reg 15/70 and 872/74, both as amended); emission standards for asphalt plants (O. Reg. 183/72).

Guidelines, which are criteria to which reference may be had in evaluating proposed discharges, but which do not have the force of law, have been written. The most recent are entitled Water Management - Goals, Policies, Objectives and Implementation Procedures of the Ministry of the Environment, (MOE, 1978).

There is absolutely no provision for input from the public or industry into the difficult questions of standard setting, whether by regulation or otherwise.

Appeals

Rights of appeal are available:

- under the OWRA, S.79, to the Environment Appeal Board, by an applicant or person to whom an order, etc. is directed, against any refusal or cancellation of a licence, permit or approval; against terms and conditions contained in any licence, permit or approval; or against any notice, direction, report or order.
- under the EPA, S.78, to the Environmental Appeal Board, where the director refuses to approve plans and specifications; impose conditions precedent to an approval refuses to renew or suspends or revokes a licence, permit, or certificate of approval; by the applicant or holder of the permit;
- under the EPA, S.79 by a person to whom an order is directed.

It is noteworthy and deplorable that no right of appeal is provided for affected parties or public interest groups to appeal the issuance of any approval, permit, etc., or the refusal of the Director to take action in any given situation.

Public Participation

Prior to issuing a certificate of approval the Director must direct the Environmental Assessment Board to hold a hearing and report:

- where a waste management site is planned for disposal of hauled liquid industrial waste or hazardous waste, or an amount of waste in excess of that produced by 1500 persons (EPA, S.33a);
- when a municipality contemplates establishing or extending sewage works in another municipality or a territory without municipal organization (OWRA, S.43).

The Director may, in his discretion, direct a hearing:

- for any other waste disposal site or sewage treatment system (EPA, S.33c, OWRA, S.44);
- generally, where a director considers a hearing necessary or advisable under the OWRA (S.9).

Construction and Operation of Sewage and Water Works

Under the OWRA, the Ministry may, by agreement with any municipality, construct and/or operate sewage treatment facilities and water works for the benefit of the municipality, with negotiated renumeration to the MOE for its costs.

THE ENVIRONMENTAL ASSESSMENT ACT, 1975, S.O. 1975, c.69

The Environmental Assessment Act, sets up an evaluation and approval process for all projects undertaken by public authorities within the province that have not been exempted, and those private projects specifically designated.

The stated purpose of the Act is "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment".[4]

No undertaking shall be proceeded with until approval has been granted by the Minister of the Environment. The proponent of an undertaking must prepare an assessment of the likely impact of the project upon the environment and submit the document to the Ministry of the Environment.

Environment Defined

"Environment", is defined in the broadest possible terms under the Act:

> (i) air, land or water,
>
> (ii) plant and animal life, including man
>
> (iii) the social, economic and cultural conditions that influence the life of man or a community,
>
> (iv) any building, structure, machine or other device or thing made by man,
>
> (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or,
>
> (vi) any part or combination of the foregoing and the interrelationships between any two or more of them...
>
> S.1(c)

This is a far cry from the traditional concept of environment as 'air, land and water'. As a result, the function of the act is not to provide pollution control *per se*, but rather to ensure that development decisions are not made without considering all possible aspects and impacts.

Contents of an Environment Assessment

An environmental assessment submitted to the Minister shall consist of:

(a) a description of the purpose of the undertaking;

(b) a description of and a statement of the rationale for,

(i) the undertaking,

(ii) the alternative methods of carrying out the undertaking, and

(iii) the alternatives to the undertaking;

(c) a description of,

(i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,

(ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and

(iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment,

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and

(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

S.5(3)

Once again, it can be seen that the intention of the legislation is to force planners to consider all possible ramifications of and alternatives to an undertaking, and to provide the widest possible information base to the decision-maker.

Decision Making

After the document is submitted, there are two stages in the approval process. Firstly, the adequacy of the assessment is determined. Once the assessment is accepted as being "satisfactory to enable a decision to be made" (S.9(c)), the undertaking itself must be evaluated for approval.

Initially, the Ministry prepares a review of the document and gives notice to the public, making both the assessment and the review available for inspection. Members of the public may make written submissions to the Ministry (S.7). The process may then take any one of three paths.

A hearing can be requested by members of the public who have made submissions, the Minister, or the proponent himself. If this is the case, the Environmental Assessment Board will hold a hearing that covers both stages of the approval process (S.72). After the Board has made its decision, the Minister and Cabinet have 28 days in which to vary the Board's decision, substitute

for it or require a new hearing (S.24). To date, no hearings have been held by the Board under this Act.

If no hearing is requested, the Minister first decides whether the environmental assessment is satisfactory to enable a decision to be made. If it is not, he may send it back for changes before he accepts it (S.9 and S.10). Then, the Minister and Cabinet must decide whether to approve the undertaking, approve it subject to terms and conditions, or refuse to give approval (S.14).

The third, and most complicated, possibility arises if a hearing is requested after the assessment document has already been approved. At this state, the hearing would consider only the project itself (S.13).

Class Environmental Assessments

Concern has been expressed about the difficulty of requiring environmental assessments for small, frequently recurring projects which are similar in nature. For these types of projects many Provincial Ministries have decided to carry out "class environmental assessments."

> That is, where a common set of procedures for planning, construction and implementation can be identified for a project type, an environmental assessment document for that project type will be prepared under the Act and submitted to the Minister of the Environment for review...A hearing concerning the class environmental assessment will be held by the Environmental Assessment Board, which will then determine if the document is to be accepted and if approval to proceed is to given. Approval would subject to specified conditions, which would be legally be required to be followed in carrying out projects of the approved type.
>
> Recommendation for the Designation and Exemption of Municipal Approvals Under the Environmental Assessment Act, EA Update, Vol. II, No. 1 January, 1977.

It should be noted that there is no basis in the act for the use of class E.A.'s.

Exemptions

Both the Cabinet, by regulation (S.41(f)), and the Minister, by order approved by the Cabinet (S.30) have exemption powers. The Minister is limited to specific undertakings; the Cabinet may wield a wider broom and exempt entire classes.

The Cabinet, wielded its broom at the time of proclamation. This regulation will be discussed below.

The Minister has, to date, exempted approximately 170 specific undertakings, not dealt with in the sweeping exemptions contained in the regulation. From a review of exemption orders, on their face, most seem reasonable, and done for "grandfather" reasons or because the potential impact obviously seems small. Nonetheless, there are a certain number of exemptions which are not so apparently equitable or innocuous, and which illustrate the potential for abuse of The Environmental Assessment Act.

No criteria have been provided for the exemption of projects in either legislation or regulation.

No provision is made for notice to or submissions by affected parties regarding the appropriateness of any given exemption. Ironically, while the ability of affected persons and interested public to provide input into an environmental assessment is well provided for, the whole process can be nullified by ministerial order, with no recourse.

Objectives of Environmental Assessment

The significant feature of The Environmental Assessment Act is that it sets up a broad and comprehensive

environmental planning process. Prior to passage, the objectives of the Act were set out:

> (1) To identify and evaluate all potentially significant environmental effects of proposed undertakings at a stage when alternative solutions, including remedial measures and the alternative of not proceeding, are available to decision-makers.
>
> (2) To ensure that the proponent of an undertaking and governments and agencies required to approve the undertaking give due consideration to the means of avoiding or mitigating any adverse environmental effects prior to granting approval to proceed with an undertaking.
>
> Green Paper on Environmental Assessment, Government of Ontario, 1973.

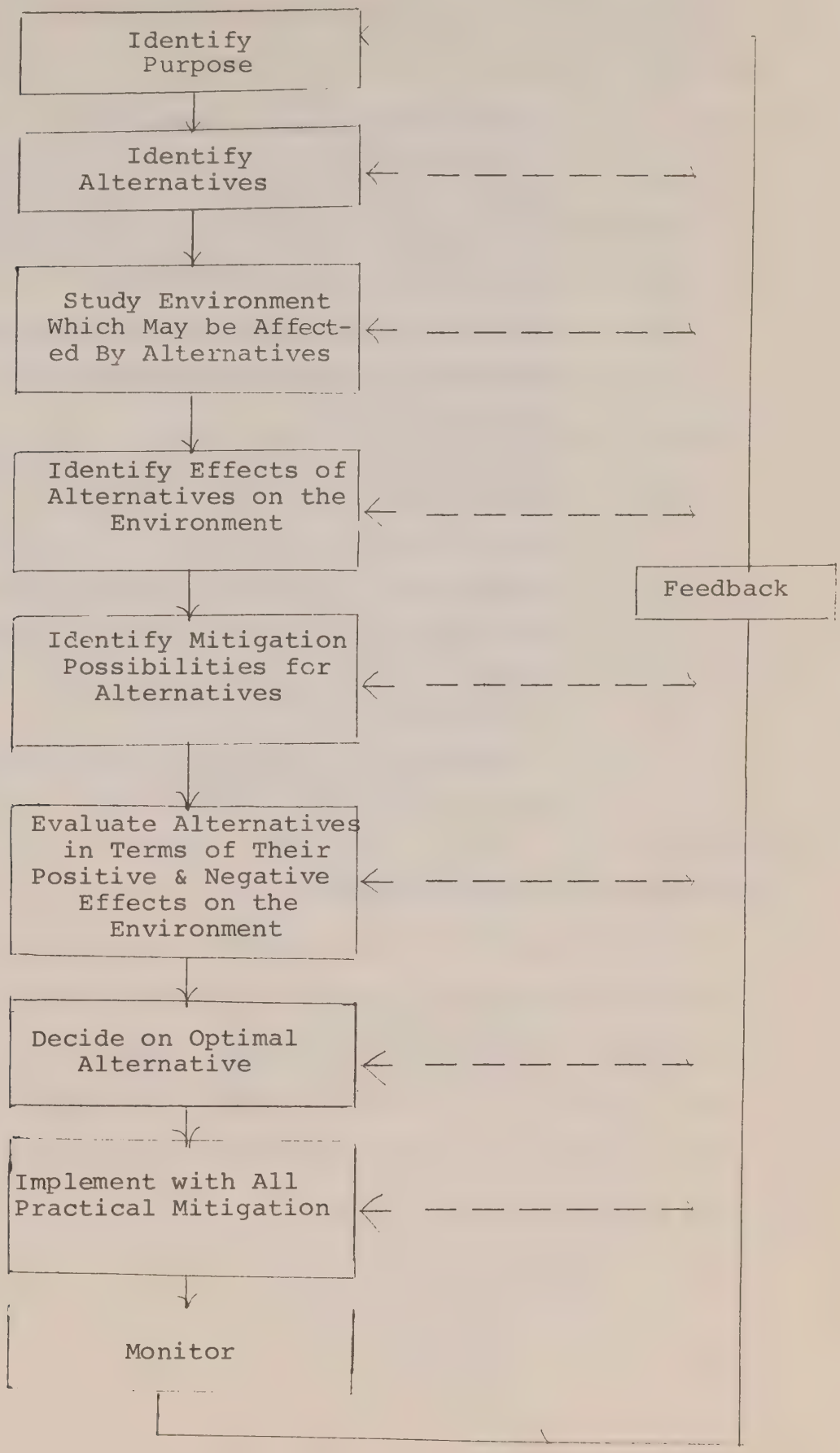
The preparation of the environmental assessment is meant to improve the process of decision-making. A Senior Environmental Planner in the Ministry of Environment has commented that

> Environmental Assessment is not intended to make natural environmental factors paramount. Rather, it is intended to see that they are given fair weight and consideration in the decision-making process. Perhaps the intent of the legislature might have been clearer had the statute been entitled, not the Environmental Assessment Act but, "The Decision-Making Act".

A model of the decision-making process, provided by the same official, is included on the following page.

BASIC ENVIRONMENTAL PLANNING MODEL

ENVISAGED IN THE ENVIRONMENTAL ASSESSMENT ACT, 1975



The Environmental Assessment Act represents a shift in emphasis from present policy in several respects. Ideally, many benefits result:

- rather than narrow, issue-specific evaluation, it encourages a holistic view that takes in the entire complex of social, economic and physical environmental effects including secondary, off-site and cumulative effects,
- rather than concentrating on abatement of existing pollution, it emphasizes prevention through better planning,
- it promotes a more realistic assessment of the total costs involved in a project, with an understanding of who pays the indirect costs.
- it gives the public an opportunity to become involved at an earlier stage in the decision-making process, rather than after important commitments have been made, and
- it permits the trade-offs that inevitably take place to be identified and dealt with openly.

Implementation by Regulation

Ontario Regulation 836/76 announced simultaneously with the proclamation of the portions of the Act which deal with public undertakings, provides some "fine-tuning" and also "phasing in" provisions respecting the application of the Act. (Subsequent amendments to this regulation are not relevant to this study.)

The regulation, as amended, exempts thirteen ministries entirely from the provisions of the Act. Those also considered here are Ministries of Housing, Treasury and Economics and Intergovernmental Affairs. The ministries exempted tend not to be involved in projects of large physical magnitude and impact. Projects undertaken by the Ministry of Supply and Services on behalf of these ministries are not exempt.

The regulation contains "grandfather" clauses, providing that certain undertakings, which have already reached certain stages of planning or completion, be exempted.

Municipal undertakings are exempted, with the proviso that they will be brought back in at some time in the future by Ministerial order.

Application to Permits and Licences

Perhaps the most important section of the regulation, in terms of imposing public accessibility on MNR decision-making north of 50°, is section 9.

> The undertaking of making a loan, giving a grant, giving a guarantee of debts or issuing or granting a licence, permit, approval, permission or consent is exempt...

The section seems clear - the granting of approvals generally is exempt. We understand that this is the view taken by the MNR, but that the MOE is attempting to establish a position that this section only applies to such permits, licences, etc., which are non-discretionary (e.g. prospectors licences). Where study and evaluation of a proposal is concerned, prior to a decision pro or con, the act will apply.

It is unfortunate that this controversy is taking place under the guise of technical legal arguments, when in reality two fundamental policy issues exist:

- should there be guaranteed public input when the MNR grants a permit, licence, etc., which will have the effect of a land use decision?
- if so, what form should this guarantee take?

Needless to say, this study develops a strong affirmative position respecting the first issue.

As to the second, two alternatives exist:

- apply environmental assessment to the 'undertaking' of evaluating a proposal for approval,
- amend the legislation requiring approvals to impose a public participation and hearing process directly on the approval granting authorities.

The choice here is not as easy. Once again, what is most important is that the attributes of environmental assessment be incorporated. It is not possible to

to provide a holistic and accessible decision-making process within the limitations of other legislation, then The Environmental Assessment Act should apply. Otherwise, it might be preferable to amend the other legislation.

Application to Planning

Treated at some length in Chapter V is the dialogue between MOE and MNR as to the applicability of the Act to the undertaking of plan preparation. Suffice it to say, for the purposes of this chapter, that a literal reading of the legislation provides no guidance. Section 5(2), which exempts feasibility studies, is clearly not relevant with the possible exception of the first information gathering stage.

Once again, it would be preferable to settle this issue as a matter of policy first, and then amend the Act accordingly.

CHAPTER 5

ADMINISTRATION AND DECISION-MAKING

I. INTRODUCTION: THE NORTHERN SETTING

Administrative and decision-making practices for the area 'north of 50° ' are often significantly different from those of the south. The principal reasons are:

- The overwhelming majority of the land area is neither organized nor municipally incorporated. Where settlements do exist, they are generally too small to have developed municipal structures. Thus, the exercise by municipalities of Planning Act powers such as official planning, zoning, and development control is not a significant factor in the 'remote north';

- Many of the settlements are Indian communities on reserve land and therefore subject only to federal legislative control;

- Over ninety percent of the land is public land, administered and managed by the Ministry of Natural Resources.

While the preceding chapter set out the legal basis for certain powers and responsibilities of the Executive Branch, it is the purpose of this chapter to show how they are exercised in practice by ministries involved in policy making, land use planning, or environmental management 'north of 50° '.

The Ministry of Natural Resources (MNR), as custodian of Crown land and as initiator and manager of resource development, is the most active ministry north of 50° and has the predominant role in allocating lands and land uses.

Thus, although attention is given to the Ministries of Treasury and Economics, Intergovernmental Affairs, Northern Affairs, Housing and Environment, special focus is placed on the administrative and planning programs of the Ministry of Natural Resources.

II. MINISTRY OF TREASURY AND ECONOMICS

The Ministry of Treasury and Economics is described as having a dual role. Its specific responsibility is for fiscal planning, cash management and economic policy development.[1]

Its second function, likened to that of the hub of a wheel, involves pulling together the contributions of other ministries.

In Northern Ontario, Treasury delegates this second function to the Ministry of Northern Affairs, which then serves as co-ordinator of other line ministries in the implementation of policies and programs.

In 1966, Treasury and Economics published the first of a series of economic planning documents, entitled Design for Development. These set out broad provincial policies and programs relating to regional development and local government reform.[2] For each of five 'economic regions', objectives were established in terms of overall economic growth, designation of population growth centres, employment targets, and other socioeconomic factors. It was meant to be an umbrella under which all other ministries would undertake comprehensive planning for their own program areas.

Although the Toronto-Centered Region Plan was one of the most well known attempts at implementation, it seems that neither it nor Design for Development are any longer considered relevant in southern Ontario. In the north however, the provincial role has continued in the creation of economic and social development strategies for Northwestern and Northeastern Ontario. However, the focus has generally been on areas lying south of the 50th parallel.[3] Follow-up documents for Northwestern Ontario were published in 1970,

1971, 1977, 1978, and 1979 and for Northeastern Ontario in 1971 and 1976.* The Northeastern are said to be more general, containing fewer specific development proposals than the Northwestern.

These policies and programs have been "implemented primarily through the development and operation of the Regional Priority Budget", responsibility for the northern part of which has been given to the Ministry of Northern Affairs.[5]

Treasury's economic development goals especially with respect to job creation, have provided a policy basis for development of resource production "targets"** by the Ministry of Natural Resources. A treasury official said, however, that they no longer set specific numerical objectives but, rather, develop broad economic strategies and supervise individual projects. Production targets are now said to be developed within the MNR, circulated to other ministries, and discussed and approved at cabinet level.

III. MINISTRY OF INTER-GOVERNMENTAL AFFAIRS (MIA)

Treasury, Economics and Inter-Governmental Affairs (TEIGA) were combined for a period of time, but separated again in 1978.

* See Bibliography

** "Targets" are specific quotas for production of timber, fish and wild life and other resources; even recreational development programs are translated into "user days".

Inter-Governmental Affairs is responsible for co-ordinating Provincial dealings with both the Federal and municipal levels of government. In the north, it is concerned with local government functions such as finance policy, organization and municipal boundaries.

Except for its studies relating to the location of municipal boundaries, MIA has no land use planning role in the north (See Appendix G).

IV. MINISTRY OF NORTHERN AFFAIRS (MNA)

Prior to its creation in 1977, MNA's functions had been carried out by the Northern Affairs Branch of the Ministry of Natural Resources. Although the southern boundaries of ministerial jurisdiction are not specified by legislation, they are generally accepted to be the French River south of Sudbury.

The MNA says[5] that it was "created to bring the service of the Government of Ontario closer to the people of the north and to ensure that a northern viewpoint is included...." In this capacity, it is said that they transmit complaints, inquiries and concerns of local residents to the appropriate government departments and, in turn, use the local media to disseminate information about government programs.

From MNA offices located throughout the north, the staff, or Northern Affairs Officers as they are called, visit remote settlements on a regular basis and act for any ministry when that ministry's staff are not available. For example, they undertake the duties of inspectors for the Ministry of Consumer and Commercial Affairs, perform some MNR licensing functions, and administer the Ontario Home Renewal Programme for MOH.

The MNA says that it has "both co-ordinating and program responsibilities".[6] It has the responsibility delegated to it by Treasury for co-ordinating line ministries and other levels of government in order to implement economic development programs.

The Ministry of Transportation and Communications gave authority for roads and for the Ontario Northland Transportation Commission to MNA when it was created. Thus, MNA is involved in the planning and building of roads and development of other kinds of transportation facilities.

MNA is responsible for administering the following programs:

- Isolated Communities Assistance Program
- Remote Airstrips Program
- Northern Ontario Resources Transportation Program
- Northern Telecommunications Program
- Townsite Development Program
- Local Services Boards Act.

The Local Services Boards Act deserves further explanation because it applies to the many small municipally unincorporated settlements scattered throughout the north. It provides, upon the initiative of local residents, for the election of local boards which have the power to tax and corresponding responsibility to provide and maintain various kinds of hard services. Where previously no form of local organization existed in these communities, the Local Services Boards may prove to be vehicles for communicating with other levels of government.

MNA is said to have no direct influence on land use planning except at the Cabinet level. However, the MNA administers Treasury's Regional Priority Budget in the north and thus provides the funding for many of the programs carried out by other ministries. "Priorities are determined by the Ministry of Northern Affairs working in close co-operation with communities and other ministries."[7]

Although MNA staff view the MNA as being responsive to needs rather than directing policies and trends, its funding power is often used as a tool to encourage certain kinds of planning that might otherwise not take place. For example, when it funded natural resource inventory preparation for the West Patricia Land Use Plan, it specifically included funds for archeological work. This enabled the Ministry of Culture and Recreation to become involved in a way that would not otherwise have been possible.

V. MINISTRY OF NATURAL RESOURCES (MNR)

The Ministry of Natural Resources' responsibilities for administration and management of public land flow from 52 different provincial Statutes (see Appendix D), chief among them The Public Lands Act, The Mining Act and The Crown Timber Act. The MNR states that its goal is:

> To provide opportunities for outdoor recreation and resource development for the continuous social and economic benefits of the people of Ontario and to administer, protect and conserve public land and waters.[8]

Therefore, MNR plays a double role as the custodian of the land as well as the manager and often developer of the resources found on the land. These wide ranging, often overlapping, and sometimes conflicting responsibilities are handled by means of a complex, decentralized administrative structure, described in the MNR's A Guide to the Organization and Management System: Toward the 80's. The organization is structured according to both program functions and geographical divisions.

Programs

"The Ministry's programs are concerned with the use of the physical resources of land, water, trees, fish, wildlife and minerals for recreation and resource utilization."[9] Administratively, these are separated into

the Land Management Program, the Outdoor Recreation Program and the Resources Products Program (See chart in Appendix F).

The Land Management Program, which is the responsibility of the six branches making up the Lands and Waters Group, has the following roles, according to the MNR manual:

-protection of land capability and quality,
-planning and control of its use,
-disposition of public lands,
-acquisition of additional land when required, and
-participation in the planning and control of the total land area of the province.

The Outdoor Recreation Program is carried out by the Provincial Parks, Fisheries, and Wildlife Branches and sometimes overlaps with forestry functions. The purpose is to provide for:

-a wide variety of outdoor recreational opportunities,
-conservation of unique or representative features, and
-contribution to the economy from tourism and its related industries.

The Resources Products Program is carried out by the Mineral Resources Group and the Forest Resources Group

in order to provide:

- -an optimum continuous contribution to the economy of Ontario,
- -by stimulating and regulating the utilization of fish, furbearers, minerals and trees,
- -by resource products industries.

The contribution to the economy is measured in terms of 'jobs provided' and 'dollars generated' by these industries.

Geographical and Hierarchical Divisions

For administrative purposes, MNR has divided the province into 8 'administrative regions' headed by Regional Directors and 49 'districts' - headed by District Managers. In each region the District Managers report to the Regional Director, who in turn is responsible to a Field Assistant Deputy Minister . There is a Field Assistant Deputy Minister for Southern Ontario and one for Northern Ontario. A third Assistant Deputy Minister is responsible for 'policy and priorities'. They, of course, report to the Deputy Minister, who reports to the Minister.

The district is the prime delivery level for the entire range of Ministry programs. The role of the Manager is to "achieve assigned program targets" by implementation of local land use plans, resource management

plans and annual work programs. The Regions play a supervisory, supportive and co-ordinating role. (For more detailed description of functions, see charts in Appendix F.)

According to the Management Guide, it is the role of the 'Main Office' to advise the Deputy Minister on programs, policies and plans, in addition to providing for the technical aspects of administration.

Because this report is concerned with the decision-making process regarding land use and environmental matters, it is useful to give attention to the role of the 'Policy and Priorities Committee' as described in the Management Guide.[10] Located in the 'Main Office' and consisting of eleven members, including the Assistant Deputy Ministers and the Executive Co-ordinators of the various programs, the Committee is responsible for:

- -reviewing objectives at all levels,
- -assessing the impact of outside forces and interest groups,
- -identifying and determining policy needs and requirements,
- -encouraging and monitoring integrated policy development and implementation,
- -determining long-term policy directions,
- -resolving conflicts within and between Ministry programs,

-determining broad priorities in the interest of ensuring mandate fulfilment, and

-considering trade-offs involved in achieving integrated resource management.

Although a great variety of MNR publications describe the Ministry's policies, plans and programs, and sometimes refer to the trade-offs that must be made in resolving conflicting goals, the above is the only specific reference to where, how and by whom these kinds of decisions are made within the Ministry.

Land Dispositions

Since the time of Confederation, the MNR and its predecessors have been making land use decisions and dispositions for a great variety of purposes. While the Ministry manages programs of its own in areas such as forestry, geology, fish and game and recreation, its other responsibilities lie in regulating the public's use of natural resources.

Acting for the Crown, the Ministry can enter into a variety of arrangements with private individuals or corporations. These include agreements, work permits, licences of occupation, leases, letters patent (sale)

and others provided by the numerous statutes under which MNR operates. By these means, MNR can define rights to minerals, timber, traplines, fishing, wild rice, cottage lots, the building of docks and dams and any other use of Crown land.

Exercise of these powers by the MNR, however, requires a whole range of decisions as to *where*, *how* and *when* an activity should occur. In addition, there is often discretion to decide *how much* is appropriate and *who* is entitled to the right.

It seems that, until recently, such decisions were made largely on an *ad hoc* basis. Each Branch of the Ministry had prepared single purpose, short term plans for its own use, with neither a clear indication of objectives nor the basis for resolving conflicts among them.[11]

History of MNR Planning

The first plans done by the Ministry of Natural Resources were the Timber Management Plans of the early 1950's. After the War, the demand for fiber and wood products greatly increased, and in 1949 a large number of foresters entered the Ministry. Forest Resource Inventories were conducted by means of aerial photography. Forestry was the first land use for which intensive planning was done.

Another, more comprehensive approach were the old District Recreational Plans applying to districts north of the French River. They used a gross classification system of open, closed and deferred. Recreational zoning committees, made up of the M.P.P. and representatives of the resource industries, and recently, an environmental representative, attempted to deal with recreational demands, protect recreational resources and prevent conflicts. They were advisory only, having no authority. In 1954, when the Provincial Parks (Act) System came into being, the zoning committees were one mechanism by which park reserves were debated.

In the late 1950's, the ministry became involved in site classification. The earliest test land-use plan was the GLACKMEYER PLAN in the Cochrane District. The plan was a study of that Township in terms of comprehensive classification and was completed in 1958.

In the early 1960's, MNR started talking about district land use planning and a group was set up within the MNR for this purpose. The first plan was developed for the Tweed District in 1963. In 1965, the Canada Land Inventory System was developed, and followed by a more detailed Ontario Land Inventory which was maintained until the 1970's.

Strategic Land Use Planning (SLUP)

Design for Development was published as provincial policy in 1966. Thus as a result of both evolution within the MNR itself and the cabinet initiative, MNR undertook Strategic Land Use Planning in order to place its operations within a long-term provincial and regional context. In 1972, the Land Use Coordination Branch was set up within the 'Lands and Waters' group of the MNR.

According to the Ministry [12] there are three basic points of difference between this approach and the detailed planning formerly done by the Ministry: planning is to be preceded by clear statements of objectives; it is to proceed from the broadest geographic area down to the local level; and it is to incorporate public participation into the process.

Part One of the Ontario Strategic Land Use Plan (OSLUP), published in 1974, contained province-wide MNR policy proposals and divided the province into three large planning regions - Northwestern, Northeastern and Southern. Part Two of the SLUP process involves preparation of plans for each of these regions and the districts within them.

Administration of Planning Process

At this point it is important to distinguish between the terms 'planning regions' and 'administrative regions.' The Northwestern and Northeastern planning regions each cover roughly two administrative regions and the Southern planning region covers four. There is no separate administrative structure for the planning regions; work is handled through the existing offices of the administrative regions and districts. At the local level, planning districts and administrative districts coincide except in cases where 'special purpose' planning areas are created.

According to the MNR, planning staff at the district level report to the District Manager, or in some cases report through the lands supervisor to the District Manager. All senior planners at the regional level report to the Regional Lands Co-ordinator, who reports to the Regional Director.

The role of the planners in the Land Use Coordination Branch at the Main Office is mainly that of advice and audit. They provide guidance to field staff on planning matters, ensure that planning is carried out according to MNR's internal Guidelines for Land Use Planning and comment on content. They are directly responsible to the Deputy Minister.

Thus, on paper there is no direct link between planning staff at the Main Office and those in the field. However, those at the Head Office do talk informally with field planning staff, and the District Managers and Regional Directors. It

MINISTRY OF NATURAL RESOURCES

PLANNING REGIONS ADMINISTRATIVE REGIONS

AND DISTRICTS

is the Regional Directors who make the formal decisions on planning matters.

Various Types of Plans and Their Purposes

MNR defines a land use plan as "A document which indicates how the Ministry plans to use Crown land and how the Ministry intends to influence the use of private land in order to achieve its objectives."[13] From this it can be seen that the MNR plans are different from the official plans and zoning by-laws of The Planning Act. These differences will be elaborated upon in the course of this report.

There are five different subsystems in the Ministry's corporate planning system:[14]

1. Policy planning, which specifies what is to be achieved and why;
2. Land use planning, which specifies where the MNR programmes are to occur;
3. Resource management planning, which specifies how a resource will be managed;
4. Work programme planning, which deals with funding and timing for programmes; and,
5. Work programme evaluation, which provides feedback on performance.

It is said that land use planning must take into consideration all of the objectives of the Ministry and deal with them in a comprehensive way. The purpose of a land use plan is to coordinate all the various ministry programs and provide resolution of conflicts among them. Resource management,

on the other hand, deals primarily with one objective and use such as forestry and is also more site specific. While a land use plan may indicate that a group of lakes is to be used for cottaging, it is the lake management plan which indicates specific locations for the cottages.

These distinctions are especially relevant when considering the application of the environmental assessment process to MNR plans.

The following land use plans will coordinate MNR's activities in Northern Ontario (some are completed and others still in the process of preparation):

- Northwestern and Northeastern Strategic Land Use plans
- District Plans
- Special Purpose Plans
    - Lake of the Woods
    - West Patricia

Northwestern and Northeastern Strategic Land Use Plans

When completed, these will be both policy and land use plans providing broad guidelines for the district level land use and management plans. For their respective regions, they will set out general policies, production quotas and broadly defined areas of land use.

Phase I, Northwestern Ontario was published in 1974 and Phase I, Northeastern Ontario in 1978. Similar in structure, they present in maps and data a profile of the regions' history, geography, population, employment and natural

resources. Also included are descriptions of relevant plans of other ministries, summaries of key issues, and discussion of 'candidate' policies.

The policy underpinnings for the Northwestern plan are clearly derived from Design for Development: Northwestern Ontario, Phase 2 - Policy Recommendations. In the Northeastern document, however, no reference is made to Design for Development.

It was the stated purpose of both of these phase I reports to solicite comments from the public and other government ministries.

Phase II, Proposed Policy, Northwestern Ontario (1977), is called "a revised policy package" based upon review of Phase I within the Ministry and through an active public participation programme. The second report discusses public criticisms of the first phase and presents 'revised' policies for further review and comment. (See Chapter 6 for analysis of public participation program).

Phase II presents 'general' policies on management systems and operating policy, local and traditional users, the environment, fire and Crown land dispositions. It presents 'particular' policies on residential, industrial and special development, agriculture, commercial and sport fishing, fur, wild rice, forestry, mining, tourism, outdoor recreation, parks, wildlife and cottaging.

Phase II for the Northeastern Region has not yet been completed. It is said that both Phases II and III will be

published in combined form in 1980.

Phase III for the Northwestern Region, expected in spring of 1980, will be the draft land use plan. It is said that there will be opportunity for public reaction before the plan is finalized.

For both regions the second phase of the planning process has been changed without explanation. Phase II was to have included alternative land use plans as well as the revised policies for public consideration.

District Plans

The district plans are land use plans and will designate zones for various types of activities on a much finer scale than in the regional plan.

District planning is done for the purpose of realizing the 'targets,' which are 20 year quotas for production and utilization of natural resources. Upon receiving their quotas the districts planners assess the capacity and suitability of the land base against the demand. Trading may occur among the districts as well as some adjustment of total targets based upon a 'testing' process.

In order to provide for often conflicting objectives such as recreation, wilderness areas, and resource production, zones are created designating type and intensity of uses permitted within each area. Once the plan has been approved, the District Manager is accountable for the results.

The general pattern said to be followed in plan preparation is the following:

(1) Staff prepare a background document consisting of information available to them at the time about the resources and existing uses of the area. This is presented to the public for their comments and contributions.

(2) The feedback is used in developing proposed policies and alternative land uses which are again presented to the public.

(3) A conceptual or Draft Land Use Plan is completed and made available for public scrutiny.

(4) The Final Land Use Plan is approved.

The methods, frequency and timing of public involvement can be varied at the discretion of the planners according to the nature of the situation. In Northern Ontario the first stage of public participation for the District plans is scheduled for spring 1980.

Although planning programs in the districts of Red Lake, Sioux Lookout and Geraldton are further along due to greater funding, all District plans in Northwestern Ontario are expected to be completed by 1981.

Special Purpose Plans

Lake of the Woods Land Use Plan (LWLUP). The Lake of the Woods area, often referred to as the "Muskoka of the North," has a district-scale plan published on November 1, 1977. It was completed in advance of the other plans because

of intense pressure for recreational and resource development and is said to be the prototype for all subsequent District plans. Because the boundaries were drawn with a special purpose in mind, they do not coincide with the existing districts of Kenora, Fort Francis, and Dryden.

The plan sets out policies and objectives concerning various resources and user groups. It divides the area into 26 zones - one with a Section 17 order - and for each zone specifies allowable uses and intensity of development.

According to the Lake of the Woods document, the planning process followed the stages set out for district plans and involved public participation at each stage.

In the text, the plan is referred to as a 'concept plan' which is to be followed by a "Detailed Development Plan." However, this latter has apparently been scrapped. One assumes that detailed development will be specified in lake management plans but it is unclear whether these are to be included in the public participation process.

It is said that "all Ministries with jurisdiction over the development or use of resources within the planning area have had an input into the planning process" and therefore "the document will serve as the official guideline" for the programs of other Ministries, including the review of private developments by the Ministry of Housing.[15] The plan is co-signed by the Minister of Housing.

West Patricia Land Use Plan (WPLUP). West Patricia is another special purpose planning area, its boundaries drawn in order to amalgamate the planning programs of the districts of Red Lake, Sioux Lookout and part of Geraldton. The planning process was accelerated here in order to deal with the issues surrounding the Reed Paper proposal, which covers an area smaller than and contained within the boundaries of the West Patricia Land Use Plan.

Prior to the time of that proposal very little resource development activity took place north of 50° However, because of the environmental sensitivity of that part of Ontario due to fragility of top soil and ecology, slow rate of regeneration, lower tolerance for pollution and dependence of much of the local population on a large land base for their livelihood, questions of the suitability of pulp and paper operations, both in terms of economic viability and environmental impact, became crucial.

The planning process underway is similar to that previously described. The first phase, already completed, involved collection and analysis of data, testing of capacity, publication of information papers and public participation. During the second phase, proposed policy and an optional land use plan were developed. These were to be presented to the public beginning in January or February of 1980. During the third phase, a preferred land use plan will be chosen, providing for land allocation and implementaion. The final plan will be similar to the Lake of the Woods plan

and include procedures for draft and review.

Initiated after the passage of the Environmental Assessment Act (EAA) (1975), the West Patricia Plan will be the first MNR land use plan to be reviewed under the Act. The MNR will make its submission after selecting a preferred plan in phase III. In addition to the assessment of the government plan, the private operations have also been brought under the Act by special regulation. If on the basis of the forest inventory, Great Lakes Paper (which has since acquired the Reed interest) considers the operation economically viable, it will submit an EA on its proposed harvesting operations and a second on that of the mills and manufactories.

Under the Act, it will be possible for the public to request a hearing on one or all of the three plans. Thus, if events should reach this stage, an entirely new dimension will be added to the decision-making process.

According to the terms of reference, the purpose of the plan is to allocate the land base in order to achieve the objectives established in SLUP for Northwestern Ontario and to ensure that development will be compatible with maintenance of a high quality environment and with the aspirations of the local people.

Until the draft land use plan is available to the public, the means by which these objectives are to be achieved and potential conflicts resolved can only be inferred from the nature of existing plans such as SLUP and Lake of the Woods. Because this area, with its sparse population (over

50% native) and almost total ownership of land by the Crown is typical of the situation in the far north, examination of the decision-making process employed here is central to the mandate of the Royal Commission on the Northern Environment. Thus, closer analysis of the existing plans, the public participation process and the application of the EAA will occur later in this report.

Approval Process for MNR Plans

Legal Requirements. None of the statutes under which MNR operates require that the Ministry create formal plans, land use or otherwise. Therefore, there are no legal specifications for any kind of planning or approval process.

Plan approval, as currently practiced, is an internal process and when completed, the signature of the Minister of Natural Resources indicates that the plan is official Ministry policy and will serve as the basis for co-ordinating MNR programs in that planning area.

Role of the Public. The MNR is not required by law to give notice to the public in general or to people directly affected by its undertakings. Nor do the statutes under which it operates provide the opportunity for any member of the public to request a hearing with respect to a proposed MNR plan. Therefore the public does not have the same rights to participate in the approval process, as are available under The Planning Act (see Chapter 7 Due Process).

Review and Appeal. MNR states that its plans are intended to be flexible in order to respond to new information and changing circumstances and therefore provides for a review of its land use plans every five years, complete with public participation. In addition, changes may be suggested by any members of the public at any time, according to the following procedure:

A person would bring their complaint or suggestion to the District Manager. If the change were minor, it could be handled at the local level. If major, it would require the approval of the main office and be recycled through the public participation process. Both the original decision as to whether the change is major or minor and the final decision are made by MNR staff.

What if the public is dissatisfied with either the original plan or the response to the suggestion? The MNR suggests that they may approach senior Ministry staff, members of parliament or the news media.

Thus, members of the public have no legal recourse from MNR land use decisions, nor do they have standing to require that MNR abide by its own policies and plans.

Role of Other Ministries. Other ministries have the opportunity to influence MNR's policies and plans at the Cabinet level and through informal lines of communication. The MNR involves other ministries in its planning process on a more formal basis in several ways.

Inter-Ministry Steering Committees were set up in a technical advisory role for both the Lake of the Woods Land Use Plan and the West Patricia Land Use Plan. Thus, representatives of all ministries with a role in the north were involved in the planning process for the Lake of the Woods area and are currently involved in the West Patricia area. The nature of their contributions and degree of influence upon the final decisions cannot be evaluated, however.

The Ministry of Housing Official Plan evaluation (not approval) process was utilized by MNR for the Lake of the Woods Plan. The plan was circulated to all relevant ministries for their comments in the same manner as an official plan, and the final plan signed by the Minister of Housing as well as the Minister of Natural Resources.

The MOH has a direct interest in planning for the Lake of the Woods area because of the pressure for development of private land there. In evaluating applications for subdivision approvals, the plan is used by the MOH as a guideline for lake development capacity. It is not likely that other district plans will be circulated in this manner unless the MOH has a substantial 'interest' in the area.

The Ministry of Housing subdivision approval process is also employed by the MNR for its own subdivisions on Crown land. Although not legally required to do so, the

Ministry submits to the same process as a private developer, giving other ministries the opportunity to evaluate its plans. Some MOH staff felt that the MNR was more conscientious than private developers in assessment of environmental impact and should be congratulated for their approach to cottage development.

Although the previous mechanisms are employed at the MNR's discretion, the Environmental Assessment Act is not. Under this Act, the MNR is required to submit an environmental assessment of its 'undertakings' for a government review, co-ordinated by the Ministry of the Environment. Final approval may involve a public hearing and/or approval by the Minister of the Environment and the Cabinet. The effective application of the Act will be determined to a large measure by the definition of 'undertaking' finally agreed upon (for further discussion see Section VII of this chapter and Section III of Chapter 7).

Implementation of MNR Plans

Plans can be implemented through the MNR's own programmes or through arrangements with private individuals or companies.

Crown Land. When MNR is dealing with private individuals or companies, it can use its traditional methods of disposition to ensure that its land use plans are followed. It has the power to grant the use of land for restricted purposes and restricted time periods by means of agreements, work permits, licences of occupation, leases and letters patent (sale). Even where land is sold, MNR can retain certain rights to the land specified in the patent document. If the owner does not comply with the conditions, the MNR may revoke the rights to the land.

Private Land. The MNR has the power to regulate land use on private land (that is not within a municipality) pursuant to S.17 of The Public Lands Act. However, S.17 orders are not widely used anymore. Where settlements are involved, the MNR prefers to give jurisdiction to the MOH, which has concurrent powers under S.32 of The Planning Act.

Although the power is there, enforcement can be a problem due to distance, lack of sufficient personnel in the field and inadequate provisons for penalties in the Act. According to MNR staff, the Act is in the process of being rewritten, in order to make the existing sections more cogent and useful.

Other Agencies and Levels of Government. The MNR says that its plans describe what it will do with Crown land and how it will try to influence the use of private land and the actions of other agencies or levels of government in order to achieve its objectives. Implementation is to occur at the level of the District, or local land use plan. The only completed, and therefore best, example we have of such is the Lake of the Woods Plan, which states in the Forward that "this document will serve as the official guideline for all the programmes of the various Provincial Ministries".

According to staff of the MOH, the document is meant to be a policy guideline to other ministries but has absolutely no force of law with respect to other government bodies or the private sector. It is an internal policy document for the MNR only.

The Tri-Municipal Planning Area of Kenora, Keewatin and Jaffray-Melick, which covers approximately 400 square miles, is located within the boundaries of the Lake of the Woods Land Use Plan and is currently undergoing an official plan exercise. Although MNR seems to consider the preparation and adoption of local official plans and zoning by-laws as part of its implementation process in this area,[16] the Planning Board is legally under no obligation to comply with

the MNR plan. For example, the lake frontage standards for cottage lots in the draft official plan are different from those required by the Lake of the Woods Plan.

Where Crown land falls within the boundaries of an official plan, the MNR will usually comply with the official plan, although it is not required to do so. However, in cases where large planning areas cover extensive amounts of Crown land, the municipality and the MNR may negotiate the matter, according to MNR officials.

VI. THE MINISTRY OF HOUSING (MOH)

In the North, the Ministry of Housing is responsible for municipalities, improvement districts, unorganized settlements, and private land requiring severances or subdivisions, as well as its own housing programs.

Areas of Jurisdiction-Municipalities

MOH's primary role, of course, is the administration of official plans and assisting small municipalities in development of plans and zoning by-laws. An 'improvement district' is a new municipality which does not yet elect its own Council. A Board of Directors is appointed by the Ministry of Intergovernmental Affairs.

Note: the term 'incorporated' municipality is, legally speaking, more correct than the commonly used phrase 'organized' municipality (see Appendix G).

Planning Areas

Where 'unorganized' (properly referred to as 'unincorporated') communities are located near a municipality the MOH policy is to create a large planning area, under The Planning Act, which encompasses both the municipality and the surrounding settlements.

In such a case the municipality will implement any resulting official plan through zoning by-laws and the Minister will impose a S.32 order on the unincorporated area if the local planning board will administer it.

Near Sioux North, there is a planning area which includes no incorporated municipalities. The Minister has delegated power to the planning board to grant consents and will delegate power to administer zoning orders. Thus, whatever their future in the south, planning boards will be retained in the north as an essential element of the administration and decision-making process in planning areas.

Subdivisions and Severances

When application is made for approval to sever or subdivide private land, the matter is under the jurisdiction of the MOH, even if the land is located in unorganized territory.

Section 32 Orders - Private Land

Where there is no municipality, MOH has the power to act under S.32 of The Planning Act as if it were a municipality in order to impose any restrictions that a municipality might have imposed on private land. It has not been the MOH practice to apply these orders in the north; only one has been made north of 50°. These orders offer convenient and enforceable zoning procedures for unincorporated or unplanned areas and may be expected to be used to implement official plans where they are placed over unincorporated areas.

Due Process Under The Planning Act

Where official plans and zoning by-laws are being approved or amended; where a S.32 order covers private land or where a subdivision or severance of private property is being applied for, The Planning Act specifies that certain procedures be followed.

First, notice of the matter must be given to all potentially affected parties. Then, any person in opposition may request that the matter be referred to the Ontario Municipal Board for a hearing and the Board will act in place of the Minister of Housing.

The Statutory Powers Procedure Act, 1971 governs the conduct of the hearing, providing for the calling of expert witness and cross-examination by both sides. A written decision is handed down and appeal on legal grounds can be made to the courts, and appeal on policy grounds can be made to the Cabinet (see Chapter 4).

Where private land does not come under The Planning Act, neither owner nor other affected parties have any rights to notice and a hearing (see Chapter 7).

Other Settlement Areas

In the area north of 50° (about half the total area of Ontario) there are only five municipalities, one improvement district and one development board. Of the small settlements scattered throughout the vast unorganized areas, most are too remote to be included in planning areas. Some are being considered for local service boards instead.

At one time the MNR controlled large sections of the north with Section 17 orders. After a recent review, however, the Section 17 orders have been removed except where MNR has resource concerns. MOH perceives a responsibility for planning wherever there are settlements in the unorganized areas and attempts to deal with the planning problems caused by resource industries.

The concentration of people in the north is on patented land, but even where The Public Lands Act does apply, the MNR works with the MOH in planning for settlements. In cases where a community is growing, it is agreed that MOH will decide whether Crown land sites are appropriate for development. The Strategic Land Use Plan is to guarantee that MNR will release Crown land in conformity with any official plan or, where unplanned, at MOH request.

Residents of unincorporated areas are said to be at a disadvantage because they do not have the rights of ratepayers of incorporated municipalities. They have no protection against inappropriate development and no elected council or guaranteed voice in provincial affairs.

Municipal status would be too onerous a responsibility for a settlement of 20 houses. However, in some cases residents have rejected local government, allegedly due to animosity towards government and planning in general and reluctance to assume responsibilities and pay local taxes. Thus as one MOH official put it, "while people want pipes, parks, fire prevention and representation, they often do not want local government".

MOH Influence on Land Use Decisions North of 50°

Although MOH played a formal role in the development of the Lake of the Woods Land Use Plan and will also be

involved in its implementation, it is unlikely that MOH will play a similar role north of 50°.

MOH does not have a direct interest in the West Patricia Land Use Plan because it mainly forestry-oriented. However, MOH is studying the potential impact of the proposed development on the settlements of the area in order to help them prepare for possible expansion and other consequences.

It is said that MOH receives and comments upon all proposals for subdivisions on Crown land and copies of lake management plans that MNR prepares for the area. Thus, on matters pertaining to settlements there appears to be substantial co-operation between the MOH and the MNR.

However, because settled areas make up only a tiny portion of the land area under study, it would seem that MOH's role in land use and environmental planning in the far north would be correspondingly small.

VII. MINISTRY OF THE ENVIRONMENT (MOE)

> The Ontario Ministry of the Environment's role in the province is the overall protection of the environment to prevent degradation by man's activities.
>
> To achieve this goal, four objectives have been set: control over contaminant emission; establishment of environmental safeguards in planning; improved management of waste and water; and maintenance of restorative and enhancement resources.[17]

Traditional MOE Functions

MOE's traditional responsibility for pollution control and waste management is based upon three pieces of legislation:

The Environmental Protection Act, 1971

The Ontario Water Resources Act

The Pesticides Act.

By means of a system of approvals and permits, MOE is given the power to regulate air emissions, sewage systems, waste disposal sites, waste management systems, liquid industrial wastes, pollution of surface and ground water, drilling of wells, the taking of water, and the use of chemical pesticides.

Through the Federal-Provincial Accord, the Ministry also administers regulations and guidelines developed under Federal environmental legislation, in particular, the Fisheries Act.

The MOE reviews and comments upon those matters referred to it by the Ministry of Housing.

Thus decisions by individuals, companies and municipalities with regard to whether, where and how to carry out these activities will certainly be influenced by MOE requirements. Officially, MNR states that the standards of the MOE become the minimum standards of the MNR.[18]

Environmental Assessment

> In accordance with a comprehensive environmental management approach, the Ministry's familiar role in enforcing standards and objectives to protect the environment, and in building sewer and water systems, has been set within a broader environmental and planning context. This Ministry's traditional role of environmental management and protection has had increasing emphasis placed on the preventative aspects in recent years, and this preventative function has been enhanced by the passing of the Environmental Assessment Act, 1975.[19]

As administrator of The Environmental Assessment Act (EAA) the MOE has a potentially very powerful role in the planning of the north. The Act applies to government undertakings that have not been exempted and to private undertakings that have been specifically included. Thus far, most private and many government undertakings are left or placed outside its scope.

There is some confusion as to the extent of the application of the Act to MNR programmes. A current interpretation is that the Act applies to all programmes except those where MNR has no discretion, such as the standard licensing procedures. However, opinions differ as to which activities are discretionary.

Another issue arises in determining how planning programs should be evaluated. Should it be the land use plan as a whole, by classes of land uses, or by individual undertakings which implement an approved plan?

MOE staff say that plans come under the Act at the point of implementation. MNR and other government bodies like Ontario Hydro interpret this to mean that they have the liberty of submitting at either level - they can submit their land use plan or they can complete their land use plan and then submit specific development proposals that come under it.

According to the MOE, however, if they submit the individual proposals, they must still account for the decision-making process employed with respect to the alternatives to the proposed developments, the likely effects of these alternatives and possible mitigating measures.

The Environmental Assessment Section of the Environmental Approvals Branch is intent that the spirit of the Act be fulfilled by full evaluation of all the steps of the planning process. They believe that the land use plans themselves should be subject to the EAA.

The MNR's point of view seems to be that since each activity (cottaging, foresty, fish management, etc.) is covered by the Act, the land use plan itself does not need to be assessed. According to one MNR official, the MOE had decided that MNR would be double accounting if the land use plans were evaluated (a bit of a discrepancy here between the MOE account and the MNR account).

It is current MNR policy to comply with (class) environmental assessments on programs such as forest management and construction of canoe routes. However, none of these types of assessments have been submitted to date. It is also uncertain whether lake management plans will be exempted from assessment, but some MOE staff feel their inclusion is important. It is at this level that lake capability, management programmes and specific site designations are provided for.

According to the MOE, the MNR proposed to submit a class environmental assessment on its land use planning process as well as its resource managment programmes. The MOE has taken a negative view of the first proposal because a class assessment on a land use plan would be two steps removed from its application.

MOE could assess a planning process and give it general approval but it seems unreasonable to expect that such a class approval could possibly be construed to apply meaningfully to land use plans covering different and unique geographical features - the designation of which could be of considerable interest to the public.

The MOE's power under the Act to influence the MNR is not clearly set out. It will presumably be determined by Cabinet policy rather than the courts. In the meantime, negotiations between the two ministries continue.

FOOTNOTES

Chapter 5

[1]Ministry of Treasury Economics and Intergovernmnetal Affairs, Submission to the Royal Commission on the Northern Environment (Ontario, 1977).

[2]Ibid.

[3]Ibid., p.5

[4]Ibid., p.6

[5]Ministry of Northern Affairs, Submission to the Royal Commission on the Northern Environment (Ontario, 1977).

[6]Ibid.

[7]Ibid., p.14.

[8]Ministry of Natural Resources, Towards the 80's: A Guide to the Organization and Management System (Ontario, 1979 p. 2.

[9]Ibid.

[10]Ibid., p.7.

[11]Ministry of Natural Resources, Guidelines for Land Use Planning (Ontario, 1974).

[12]Ibid.

[13]Ministry of Natural Resources, "Guidelines for Land Use Planning", Unpublished, 1979. pp. 1-3.

[14]Ibid., p.1

[15]Ministry of Natural Resources, Lake of the Woods General Land Use Plan (Ontario, 1977) p.i.

[16]Ibid., p.150.

[17]Ministry of the Environment, Submission to the Royal Commission on the Northern Environment (Ontario, 1977).

[18]Ministry of Natural Resources, Northwestern Ontario Planning Region; Strategic Land Use Plan, Phase 2, Proposed Policy (Ontario, 1977) p.18.

[19]MOE, Submission to RCNE.

CHAPTER 6

PUBLIC PARTICIPATION IN MNR PLANNING

I. MNR's PURPOSE AND METHODS

According to the MNR's 1979 Guidelines for Land Use Planning:

> The purpose of a public participation program is to achieve a better plan, and to facilitate plan implementation.

It means that:

> The citizens concerned with the planning area take part in the planning process rather than react to decisions made. However, it must always be understood that decision-making remains the preogative of government.
>
> Public participation involves those affected by the plan, special interest groups, elected representatives at all levels of government, and technical specialists.
>
> It is a process of mutual education and co-operation which provides opportunities for people to work together in the creation of a plan which reflects their collective values, knowledge, experience and best judgment.[1]

The first decision of the planning staff concerns the level of public involvement they consider appropriate for the circumstances, the second is the means and techniques to be employed.

Methods Available

The "Guidelines" lists a wide variety of means by which MNR planners can convey information to the public and solicit their response. These include use of the media, surveys and questionnaires, displays and drop-in centres, consultation with individuals and special interest groups, hearings* and public meetings,** workshops, seminars, and permanent advisory committees. We are told that no one single method is used and that the mode may change from district to district depending upon the issues and circumstances.[2]

MNR Rating of Methods

Based upon the premise that two-way communication is the most important factor for a successful public participation program, the "Guidelines" gives the Advisory Committee the highest effectiveness rating, providing that it has clear terms of reference and a knowledgeable and respected membership. Workshops and seminars are also said to have moderate to high value to the planning process. Moderately valuable are meetings with interest groups (so long as the bias is recognized) and storefront displays and open house. In a small area, personal, day-to-day contact with individuals may be adequate. The news media is considered of value in disseminating information about programs, issues, and opportunities to participate. Rated lowest because they provide for basically one-way communication in a fairly rigid format are surveys and

* Hearings are defined in the "Guidelines" as formal occasions when the agency listens to citizens' briefs.

** Public Meetings are occasions when the planners make presentations to the public.

questionnaires and public meetings and hearings, although the latter are among the most frequently used.[3]

Methods Used in Practice

Having described the formal guidelines that MNR has provided for its staff, let us examine the way public participation has been employed in practice up to this time and evaluate the effectiveness of its role in the MNR planning process.

Advisory Committees. The earliest forms of public participation mentioned by the MNR are the Recreational Zoning Committees which operated in conjunction with the District Recreational Plans of the 1950's. Having advisory status only, they attempted to deal with conflicts between recreational demands and protection of recreational resources. When the Provincial Parks System came into being in 1954, it is said that the committees were one mechanism by which park reserves were debated.

Subsequent references to committees employ a variety of names, making it difficult at this time to precisely define and trace their roles. However, the District Forester's Advisory Committees, according to a former member from the Thunder Bay area (1971-1973),[4] appear be have been similar to the Zoning Committees in both membership and function. That particular District Forester's Advisory Committee was said to have been composed of the local M.P.P., the district manager, a university biologist, staff from various ministries, representatives of private sector resource concerns, and a local municipal

counsellor.

The committee met at least twice yearly and debated, among other things, the proposed production targets for the area. It was the former member's opinion that the committee played a valuable role in the decision-making process. He felt, however, that it would only work on a small district basis.

After the Ministry reorganization in 1973-1974, this committee became the Regional Manager's (sic) Advisory Committee and apparently has not met since that time.[5]

The Phase II document of the Northwestern Strategic Land Use Plan says that a Regional Director's Advisory Committee, made up of private citizens from within the Region, was involved throughout the preparation of the Strategic Plan.[6] It goes on to say that this committee will serve as a vehicle for continued public involvement in the review process. Suggestions to the Regional Director would be referred by him first to the Advisory Committee and then to the internal MNR Strategic Planning Team for their recommendations.

The Lake of the Woods document also lists the Ad Hoc Regional Advisory Committee as having been an important component of the public participation process for that plan. The plan is said to be open to review at any time and any member of the public may propose a change. The document describes the role of the Advisory Committee in the review process. Suggestions for review are to be forwarded to the Regional Director of the Northwestern Region, MNR and the Executive

Director of the Plans Administration Division, MOH. The proposal is reviewed by various government agencies and if determined to be of a minor nature, a decision will be made at that time. If of sufficient magnitude to warrant a complete review, it would be referred to the Inter-Ministry Sterring Committee, and preparations made for public hearings.

It is interesting to note that in the SLUP model the Advisory Committee participates in the initial decision as to whether the change is major or minor in nature, while in the Lake of the Woods, they are involved only after the decision is made. However, it appears that both models will remain only models because last year MNR disbanded all advisory committees at both Regional and District levels due to lack of funds to cover operating expenses.

Use of Other Methods. Turning now to a more comprehensive look at the role of public participation in the preparation of individual plans, it seems that the whole range of methods were used in preparing each of the three phases of the Lake of the Woods plan. There were closed meetings with a wide variety of special interest groups, open public meetings in all major communities of the planning area, news releases in local and Winnipeg papers and on radio and television, use of questionnaires, as well as meetings with the Inter-Ministry Steering Committee and the Regional Ad Hoc Advisory Committee.[8]

Judging from the document itself, it appears that very extensive efforts were made to involve the general public and

affected parties. Once various individuals and groups had said their piece, however, we do not know how their contributions were assessed and the trade-offs made by MNR internally. And, not being aware at this time of the nature of the alternative development concepts proposed, nor the public reaction to them, we cannot judge the effect of public input on the final decision.

II. EVALUATION OF EFFECT OF PUBLIC PARTICIPATION ON REGIONAL PLANNING IN NORTHWESTERN ONTARIO

Some answers to the above questions can be derived by comparing the Phase I and Phase II documents of the Northwestern Ontario Strategic Land Use Plan.

Description of Decision-Making Process

According to the MNR, after the publication of Phase I,

> Individuals and groups were provided with copies of the report and their written comments solicited by way of an enclosed comment sheet. In addition, members of the Regional Planning staff attended Council and group meetings, and arranged public discussion sessions throughout the Planning Region in order to answer questions on the proposed Strategic Land Use Plan and elicit public comment on the policies proposed. A compilation of public comment was prepared from the results of these sessions.[9]

As for who participates at the regional level, it is said that mainly groups respond such as the Ontario

Forest Industry Association, the Air Carriers, Treaty 3, Treaty 9, and the Ontario Tourist Outfitters Association. At the district level, where lake planning is done, individuals become more involved.

The Phase II document contained a comment form and questionnaire which could be returned to the Regional Director. Some briefs were submitted.

When the draft plan, Phase III, appears in May 1980, it is said that there will be opportunity for public reaction before the plan is finalized.

Intended Process Not Followed

MNR set out the intended stages of the decision-making process, in the introduction to Phase I. The first step was to be public comment upon the background information and proposed policy contained in the initial document.

> After this review and discussion these policies, or modifications of them, will be fully integrated and will become the objectives of the Ministry of Natural Resources Strategic Land Use Plan for Northwestern Ontario.
>
> After the integrated policy or objective package has been agreed upon, the next stage of the planning process will involve the preparation and evaluation of alternative land use plans. This stage will also include extensive public participation, and it may well require further revision of the policies.
> (underlining added)

As it has turned out, however, Phase II consists of revised policies only. According to the MNR, there will

be no presentation of alternative land use plans for the public to comment upon. It is said that the policies upon which Phase III is based are virtually the same as presented in Phase II and are now being used to guide the planning work at the district level.

Effect on Policy Content

How much weight did public contributions carry during the revision of policies presented in Phase I? Phase II contains a summary of the public comments and, in the following statement, MNR describes the changes made as a result of public comments.

> Concern was also expressed (both internally and externally) about the concept of maximizing the use of the natural resources and the apparent lack of management. As a result of the above concern the proposed policies on Forestry, Fish, Wildlife, and Mining have all been rewritten.[10]
>
> (underlining added)

In order to evaluate this statement, Forestry and Mining were selected for a closer look and those sections in Phases I and II were compared.

Forestry Policies, Phase I & II

Policy statements about Forestry in Phase II emphasize maximization of production and only touch upon forest management and the needs and objectives of other users. In spite of MNR's claim that policies were re-written in light

of public concerns, a comparison of Phase I and Phase II reveals, if anything, a stronger committment to maximum utilization of forest resources. (See copies of texts in Appendix A). Phase I states that the yearly cut at that time (1974) was 2.5 million cunits and that the "allowable" cut was 6.3 million. Concern was expressed that the allowable cut was being allocated while the Strategic Land Use Planning process was underway, thus precluding some options. In 1977, Phase II states that almost all of the allowable cut of 6.3 million has been "committed" (assumed to mean "allocated"). Thus, it is clear that decisions regarding the extent of resource utilization were not subjects for public deliberation.

Although Phase II says that "Forestry was taken to task over the apparent lack of sound management practices" by the public; the only policy statement in Phase II relevant to this concern is that the contribution of maximum value to the provincial economy will be made "through sound forest management practices consistent with the needs and objectives of other forest users."

There is no committment to any defined policies of "sound management" nor any guidelines with respect to cruicial issues such as cutting practices and regeneration. Phase I states that funding at that time provided for a future (after 2020) regeneration rate of 3.5 million cunits and that "funding for regeneration must be increased greatly

if forestry benefits are to be continuous." Phase II commits a sustained production of 6.3 million for only 20 years, saying nothing about utilization after 2020. Funding policy for regeneration is said to be under review.

Phase I mentioned the need for a strong policy regarding cutting practices. In Phase II, other than a general reference in the discussion section to "harvesting designed to enhance good regeneration," there is no mention of the conflict between advocates of clear-cutting and selective cutting and the underlying concepts of mono-culture versus species diversification.

Are sound management practices compatible with harvesting of the full allowable cut given economic and environmental constraints? The policy section does not delineate the trade-offs involved in alternative methods of forest management, nor make any reference to the role of the Environmental Assessment Act in these respects. While it is very likely that MNR addresses these issues in its detailed Forest Management Plans, no reference to such is made in Phase II, nor have they yet been submitted for environmental assessment and thereby made available to the public.

Phase II does not state who the other potential forest users are nor describe their likely needs and objectives. Phase I mentions potentially major conflicts between timbering and wilderness and natural environment parks.

Phase II handles this very generally by stating that sound forest management programs aimed at meeting the needs of all the forest users can minimize many of the apparent conflicts and alludes to practices of multiple uses and successive uses. However, as wilderness parks are described in another section as areas of "unmarred natural landscapes" and "unaffected by human action", they would certainly not be compatible with multiple uses. Thus, Phase II does not address the conflict mentioned in Phase I.

No mention is made in Phase II of the impact of cutting upon trapping and hunting activities nor the conflict with cottaging. The policy section on Local and Traditional Users states that

> The Ministry recognizes that local people and traditional users, including native people, will have a higher priority than people from outside the planning area.

Considering that the large pulp and paper operations are owned by outsiders, i.e. multinational corporations, the question of who will have priority in cases of clear conflict of legitimate interests on both sides cannot be ignored.

The allocation of timber licences is one such hotly disputed issue. Transcripts of the preliminary hearings of the Royal Commission on the Northern Environment reveal a prevailing complaint that local operators are passed over in the disposition of forest land (see Appendix B) and have no recourse from the MNR's discretion.

That the matter of who receives licences can greatly affect forest management practices and efficient utilization of materials is suggested by a report of the Independent Sawmill Operator's Committee of the Ontario Lumber Manufacturer's Association.[11]

In conclusion, it is clear from a comparison of Phases I and II that public opinion had little effect on rewriting of policy regarding production levels and management practices and it is disturbing that MNR claimed otherwise. Considering that the Strategic Land Use Plan is intended to provide the broad guidelines for all district level MNR land-use and management plans, the two pages in the Phase II document seem an inadequate basis to guide the utilization of 40 million acres of forest land.

Mining Policies Phase I and II

The Mining policies presented in Phase II represent a confirmation of the Phase I proposal "to strengthen the contribution of minerals to the economy." (See Appendix A). Phase I gives priority to expanding the extraction of minerals through an increase in geological knowledge and the role of exploration; to increasing mineral processing; and to meeting the market demand for sand and gravel. All of these are included as specific policy in Phase II.

In addition, there are policy statements in Phase II dealing with the contribution of mining activities to the Northern economy, which appear to accommodate some concerns expressed by the public. However, many of the concerns highlighted in the "Discussion" section of Phase I are not dealt

with in Phase II. The first is that of a perceived conflict between "quick maximum profits" for the developer and "optimization and continuous benefits for society." A very complex but fundamental issue, MNR does not address it directly.

Phase I mentions the "obvious" conflict between mining and exclusive park uses. Although this issue is not dealt with in Phase II under Mining Policy, a reading of the Provincial Parks policy section conveys the impression that Park uses are not considered exclusive

> Within parks, resource management activities are somewhat more regulated than on Crown lands, in that they may be confined to specific areas and times, and may be subject to quotas and locational constraints.[12]

In subsequent description of various types of parks, there are no policy statements specifically exempting wilderness parks and nature reserves from resource extraction. From the discussion section on Mining policy it appears that the principle of "sequential use" is being favoured with regard to extraction of aggregates.

Perhaps the most glaring ommission in Phase II is the lack of policy on pollution and assessment of environmental impact. The only such reference in the discussion section is to the concern that "policies of other disciplines do not unnecessarily discourage mineral exploration."

Thus, in the case of Mining and Forestry - two significant MNR activities - policies do not appear to have

been affected by public participation procedures in the manner described by MNR. In addition, it seems that the MNR policy of 'flexibility' can also mean 'unpredictability' in the planning process. If the announced stages of and forums for public participation can change without explanation as a result of internal decisions, then the public's willingness to participate and confidence in the process must surely decline.

FOOTNOTES

Chapter 6

[1]Ministry of Natural Resources, "Guidelines to Land Use Planning", Unpublished 1979, p.30.

[2]Ibid. pp.48-50.

[3]Ibid.

[4]Jim Foulds, Member of Parliament, Province of Ontario, Interview March 15, 1979.

[5]Ibid.

[6]MNR, Northwestern Ontario Strategic Land Use Plan, Phase II, Proposed Policy (Ontario, 1977) p.63.

[7]MNR, Lake of the Woods: General Land Use Plan (Ontario, 1977) pp.12, 149, 162-165.

[8]Ibid. pp.162-165.

[9]MNR, Northwestern SLUP, Phase II, p.2.

[10]Ibid. p.9.

[11]Peat, Marwick and Partners, for the Independant Sawmill Operators Committee of the Ontario Lumber Manufacturers Association, "Report on Wood Chip Production and Marketing in Ontario" (Unpublished, Toronto, 1979).

[12]MNR, Northwestern SLUP, Phase II, p.44.

CHAPTER 7

DUE PROCESS-CASE STUDIES AND COMMENTARY

Having examined the legal and administrative basis of decision-making in Northern Ontario from a fairly general and theoretical point of view, it is useful at this stage to look more closely at two cases which illustrate how these processes affect private individuals.

In reading these studies, the following questions should be asked: How was the decision made? What part did the affected parties play? What recourse had they from discretionary decisions? Was the process predictable, understandable and comprehensive? Were the decision-makers accessible, impartial and accountable?

I. DEWALD COTTAGE

In the first case, a land use conflict arose between private individuals as a result of an MNR planning decision.

Facts

In July of 1962, Gerhard and Evelyn Dewald purchased a cottage lot on Waweig Lake, in the Armstrong area just northeast of Lake Nipigon. Their purchase was the first from an intended MNR subdivision of fourteen cottage lots

and they were under the impression that the lake was to be limited to that use.[1]

In the summer of 1972, they arrived to find a commercial establishment operating about 600 feet from their property, which had been licenced and constructed without prior notice to them. Consisting of a gasoline station and float plane fly-in service, the operation proved to be a serious nuisance from the Dewald's point of view. They were disturbed by noise from the diesel generator, which operated continuously, and the rowdyism and automobile traffic of customers arriving late at night. They were also concerned about the danger to swimmers and the noise from aircraft landing and taking off every half hour immediately adjacent to their lake front. Their relationship with the owner proved to be extremely unpleasant for the duration of his operation, 1972-1974. They approached government officials and were in the process of hiring legal counsel, when the owner moved his business to another lake. Under the impression that the problem had ended, they discontinued their efforts.

Draft Lake Plan

In July of 1975, they received a copy of the draft Lake Development Plan from the MNR and were surprised to find the same site designated commercial in spite of their

vigorous objections. They retained the services of the Canadian Environmental Law Association whose solicitor sent a letter to the Ministry of Natural Resources objecting to the location of the commercial zone and asking that no approval be given until further discussion could take place. He requested information pertaining to the planning and approval process and asked that he be advised of any further developments with regard to the draft plan.[2] In their reply,[3] the MNR provided a general description of their planning and approval process but did not explain the legal basis for the plan, nor the current status of the process with respect to that specific plan.

(It is interesting to note that, according to the reply, no local advisory committee was involved and the Regional Director's Advisory Committee would receive copies of the plan only after final approval by the main office.)

Appeal to the Ombudsman

On December 23, 1975, the Dewald's solicitor wrote to the Ombudsman,[4] requesting his assistance. After conducting a review of the issues, the Ombudsman's office announced on August 24, 1976 its intention to make an investigation. In the meantime, the MNR continued with its planning process.

After some consultation with other ministries on matters such as waste disposal, the plan was approved at the regional level and then, in November 1976, given final approval by the main office in Toronto.

Seaplane Base

In April, 1977, a different operator was granted a forty year lease for a commercial operation on the same site. This person also applied for permission to operate a float plane service. On September 11, 1978, the MNR sent a letter to the lake residents asking whether they objected to the operation of a seaplane base and whether they considered it a safety hazard.

Registering an objection on the Dewald's behalf, their solicitor complained about their lack of background information, such as planning studies explaining the rationale for the choice of site, descriptions of intended structures, servicing and utilities, and copies of applications for a lease and building permits.

With regard to the immediate proposal, they had no information regarding the number and types of aircraft involved, the intended frequency of landings and take-off, safety precautions, hours of operation and methods of generating electricity. He specifically requested the names of other persons who were being asked

to comment, copies of their replies, and notice of any meetings at which the matter would be discussed. He concluded with the request:

> that you defer a final decision on this matter until adequate information has been provided me and until the Ombudsman has had a chance to complete his report and take all the necessary steps to distribute it.[5]

All of these requests were ignored and on October 6th, MNR granted the permission and informed the residents[6] that eight out of the nine replies from lake lot owners had expressed approval of the proposal.

The Dewalds had objected because they were the most adversely affected of all the cottages and because they had no assurance that the present and future operations would be any less objectionable to them than the first had been. Although MNR had given notice and requested comments, the haste with which they acted on the matter in spite of the Dewald's requests for information and time for the Ombudsman to report, led the Dewalds to conclude that the request for their viewpoint had not been made in good faith.[7]

As it has turned out, the new owner is extremely considerate of the Dewald's welfare. He has operated the service in such a way as to eliminate their serious

complaints and has maintained an excellent relationship with them. While grateful for this, they still are aware of the possibility of problems with future owners given their first experience.

Ombudsman's Report

The Ombudsman's report[8] became public in January of 1980. His general observation was that MNR's decision with respect to the choice of the location was not necessarily unreasonable. If operated in the manner of the present owner, the commercial use could be compatible with the cottage use. However, he appreciated the Dewald's concern in view of their previous experience.

It is with the planning procedures that he takes issue saying that the site decision was made "in accordance with a practice that is or may be unreasonable" according to The Ombudsman Act. Although it is evident to him that there has been an evolution within the MNR toward greater public participation in the planning process, his concern is "that the MNR Guidelines for Land Use Planning nowhere recognizes any minimum standard of public participation.". In this case, contrary to the spirit of the Guidelines, the Dewalds were put in the position of having to react after the fact, rather than contributing the decision-making process.

It is questionable to him whether any real dialogue took place since the solicitor was not given the opportunity to participate in any kind of forum "where he could have examined the basis for the planning decisions, and questioned the planners involved".

While he is not implying that there should be a hearing for every application for a water lot, his comments are directed to the preparation of overall plans for the future development of a lake. Accordingly, he recommends that:

> steps be taken to ensure that there is provision for notice, access to information, the opportunity to question planners and the right to a hearing before the final approval is given in a case such as the present one. It is my further recommendation that the Ministry ensure that certain minimum requirements for public participation be set, so that members of the public have a real opportunity to enter into an effective dialogue with Ministry planners during the course of the planning process.
>
> (Copy of Report in Appendix C)

Conclusion

In answer to the earlier questions then, it is evident that the decision-making process was confusing and unpredictable to the affected parties. From the tone of its correspondence,[9] the MNR gives the appearance of being biased toward the interests of the commercial operation.

In an effort to be more accessible, they could have invited the Dewalds to meet with them, listened to their concerns, explained the reasons for choosing the site, and discussed ways of ameliorating the problem. For instance, it would seem that the lease could have been drawn up in a form requiring the same kind of performance that the present operator has demonstrated is possible, thereby offering the Dewalds some protection.

Instead, eight years have passed since the first appearance of the problem during which time the Dewalds expended a great deal of effort to solve their problem through whatever legal and political channels were available. While the Ombudsman's report dealt with the issue on the level of general principle, it did not bring a final resolution to their specific problem - lack of future protection.

As to whether this type of situation could occur under the MNR's present planning process, it is only possible to say that under the present legislation, the process is still entirely discretionary.

II. GREAT MANITOU ISLAND

By way of contrast, a second case is presented which involves a conflict between the public interest and that of a private individual. Because the decision is subject to the hearing provisions of The Planning Act, there is an opportunity to observe the manner in which statutory requirements for due process contribute to the decision-making process.

Description of Development

Great Manitou Island is a privately owned island located in Lake Nipissing, 7 miles from the coast of North Bay, and is not included in the boundaries of any municipality. A cottage lot subdivision was proposed for the western lobe of the island by the owner, who made an application to the Ministry of Housing (MOH) for draft subdivision approval.[10]

Concerns

During the process of circulating the draft plan to other Ministries for their comments, a number of concerns were raised.

The Ministry of Natural Resources (MNR), in their letter[11] of January 18, 1978, recommended that draft approval be withheld for the following reasons:

1. the existence of a uranium deposit on the island;
2. the existence of Blue Heron and Osprey nesting grounds;
3. the existence of potential pickerel spawning grounds located just off-shore;
4. the possible existence of native archeological remains;
5. the sensitivity to erosion of the isthmus connecting the two lobes of the island.

The Ministry of the Environment, in their letter[12] of February 6, 1978, identified the following concerns:

1. potential health hazards arising from the gamma radiation and radon gas given off by the radioactive bedrock;
2. the limited capacity of the land for accommodating sewage disposal; and,
3. general environmental concerns.

Notice of the application for draft subdivision approval was placed in the papers.

Public response to the proposed development was considerable. Although some people in North Bay favoured the development, there was concern, among other things, about the fate of the large colony of Blue Herons which traditionally nested on that part of the island. The Manitou Islands Wilderness Committee, which subsequently incorporated under the name Lake Nipissing Wilderness Group, spearheaded the opposition. They felt that the island should be left in its natural state and, if possible, be purchased by the Province as a wilderness park.[13] They met with the Minister of Housing in order to present their case.

Some indication of the Ministry of Housing's (MOH) position and concerns regarding the matter is evident in a letter from the Minister of Housing to the Minister of Natural Resources, dated May 5, 1978, quoted as follows:

> It would be of considerable help to me if you could review your position concerning the implications of the proposed development. I presume from our earlier conversations that funding is not available to consider acquisition.
>
> If you feel your Ministry's mandate dictates that this application should not be approved, could you suggest what action should be initiated to preserve the critical features of the site. It has been suggested that I impose a zoning order prohibiting development. It is not my inclination to arbitrarily prohibit development rights on privately owned property...
>
> This island is an unorganized area and while I could technically impose a zoning order under section 32 of The Planning Act it would be literally impossible to police such an order. If control is necessary, would section 17 of The Public Lands Act be an appropriate control mechanism?[14]

Conditions Negotiated

In July of 1978, MNR and MOE met with the developer and negotiated a set of conditions which would be imposed on the developer and the future owners of the individual cottage lots.[15] Thereafter, the MNR, in a letter of October 17, 1978, recommended draft subdivision approval subject to the modifications agreed upon, and the MOE followed suit.

The Lake Nipissing Wilderness Group received a copy of the conditions to the draft plan but remained unsatisfied. Accordingly, they wrote to the Minister of Housing requesting a hearing at the Ontario Municipal Board, if he were not willing to turn down the development plan.[16]

The Hearing

Since the Minister is required to refer the matter to the OMB upon such a request, a hearing was scheduled for July, 1979.

During the five days of the hearing, the developer gave evidence, and his planner and heronry expert were heard, amongst others. The Lake Nipissing Wilderness Group called an MOE Environmental Officer, an MNR District Planner and a local resident. In the course

of the hearing, the following information was revealed that had not been previously available to the public:[17]

1. neither the MNR nor the MOH were willing to use their respective powers to supervise the enforcement of the draft conditions, due to lack of staff and distances involved;

2. the transportation of people, food and garbage to and from the island had not been adequately provided for by the developer;

3. according to professional literature on the subject, there was not a sufficiently wide buffer zone between the cottages and the heronry;

4. the installation of the required Class 4 Aerobic sewage system would cost approximately $10,000 per lot and would require an additional annual maintenance charge to ensure its effective operation;

5. there was not adequate information regarding the cost of running a hydro cable 7 miles underwater to the island;

6. the OMB had not seen a proper restriction on zoning and construction, which they felt should be attached to the title to ensure municipal type controls on the development; and,

7. the radioactive bedrock was emitting gamma radiation at a level that the developer believed to be safe, and about which the MOE Environmental Officer was extremely concerned.

Because the participants had not finished presenting their evidence at the end of the first week, the OMB ordered an adjournment until November, 1978. They ordered the developer to return in November with more information about the following:

1. the cost of laying the hydro cable;
2. the cost of the sewage system; and,
3. the method of ensuring that all garbage would be removed from the island.

They also requested preparation of a building scheme, similar to a municipal zoning by-law with an explanation of how it could be enforced; and finally, they requested a complete report on the gamma radiation from both the MOE and the developer's advisors.

Just prior to the recommencement of the hearing, the solicitor for the developer requested and obtained an adjournment sine die. Therefore, the hearing will not recommence unless either of the parties request it, the effect being to leave the subdivision application in limbo.

The reason given by the developer for the adjournment was to enable him and the Wilderness Group to negotiate with the Province for the purchase of the island. At this time, it appears unlikely that the hearing will be resumed.

Conclusion

Although it is impossible to speculate on the outcome had a hearing not taken place and equally impossible to predict the Board's decision should the hearing recommence, it is important to note that information was made available to all concerned parties and the Board members, which had previously been known only to some people. It is this opportunity to present evidence through calling witnesses and through cross-examining other witnesses that is the strength of the public process.

Regardless of the nature of the final decision, it will be made on a more informed basis than would otherwise have been possible. In addition, because a written decision would be given, concerned parties would know the basis for the decision.

III. COMMENTARY

MNR Viewpoint on Hearing and Appeal Procedures

According to one MNR employee, provisions for hearing and appeal procedures had been purposefully left out of The Public Lands Act. In response to the suggestion that such procedures be included, senior MNR officials expressed concern that the organization would become paralyzed by litigation. They stated that expense was an even greater concern in that MNR did not have the funds to take part in such procedures on a wide scale.

They felt that changes in the legislation were unnecessary, saying that MNR was not a myopic organization with a one-sided viewpoint. There is diversity within the Ministry and, therefore, representation of a whole range of viewpoints in the decision-making process.

In addition, they felt that current MNR public participation and planning programs include the public in the decision-making process. A senior official said that public participation has made a significant impact on the quality of their planning. Although it is more costly and slows the process down, it is well worth their investment. He said it was not possible to judge the effectiveness of these programs simply in terms of cause and effect. Because MNR officials plan more sensitively now in anticipation of public reaction, the resulting plans may need only marginal changes.

MNR - The Record

Certainly an evolution has occurred within the MNR in the direction that these employees have described. And the sincerity and good faith with which many administrators and planners carry out their responsibilities is also clearly evident. However, deficiencies inherent in the legislation and the resulting administrative practices can often add up to a bureaucratic nightmare for the people directly affected by them.

In practically no other area of the provincial government do administrators exercise such complete discretionary powers free from any forms of appeal, as those provided under The Public Lands Act.

From the previous examination and analysis of MNR public participation procedures as well as the facts of the Dewald cottage case, it can be seen that the present system does not guarantee predictability, accessibility, accountability or finality in the decision-making process.

The great variety of appeal procedures and hearing bodies, provided for under numerous Acts and administered by other branches of the Ontario government, serve as examples of the alternatives to the present MNR system that are available. Certainly because of the complexity and scope of MNR operations, no single approach would be appropriate. However, it is not within the scope of this report to further discuss alternatives, other than the one which is already available.

Application of the Environmental Assessment Act to MNR Plans

The Environmental Assessment Act provides for most of the elements of due process that the MNR planning process is currently lacking.

First of all, it ensures that plans are available for public inspection and comment before decisions are made.

It also ensures that a comprehensive approach is taken by requiring the presentation of alternatives and a review by other ministries.

It provides both affected parties and public interest groups with the opportunity for a hearing.

The decision-making process is seen to be more impartial in that the body which approves the plan is not the same as that which develops and enforces it.

The results are binding.

There are a number of problem areas that must be dealt with, however, before the Act can be effectively applied. The first concerns the extent of the Ministry of the Environment's power as the administrator of the Act. Another is the question of which type of MNR activities and plans should be assessed. And, finally, there are procedural matters to be resolved such as deadlines for submissions and manner of enforcement.

MNR officials have said that the EAA is appropriate for large-scale individual undertakings but, with respect to their land use plans, is (as one put it) "like using a sledgehammer for a fly". They feel that the EAA would impose undesirable rigidity and formality on the planning process.

While it is understandable that the concept of applying the EAA to land use plans may seem like a rather ponderous affair, it must be remembered that it is not a case of one process being applied on top of another process. Rather it is a formalization of a process that already exists in part. The Environmental Assessment Act provides for a decision-making process and it is entirely logical that the Government of Ontario should follow this process set out in its own legislation.

FOOTNOTES

Chapter 7

[1]Correspondence and other material related to the Dewald case is on file in the offices of the Canadian Environmental Law Association. Mr. & Mrs. Dewald have given their permission that it be made public.

Report of the Ombudsman - Dewald, Mr. & Mrs., by Donald R. Morand, Ombudsman, December 3, 1979. A copy of the entire report may be found in Appendix C.

[2]December 23, 1975. Letter from John Swaigen, Counsel, Canadian Environmental Law Association, to Mr. G.O. Koistinen, District Manager, Nipigon District, Ministry of Natural Resources.

[3]January 19, 1976. Letter from G.O. Koistinen to J. Swaigen.

[4]December 23, 1975. Letter from J. Swaigen to Mr. Arthur Maloney, Q.C., Ombudsman.

[5]September 21, 1978. Letter from J. Swaigen to G.O. Koistinen.

[6]October 12, 1978. Letter from G.O. Koistinen to J. Swaigen.

[7]October 30, 1978. Letter from J. Swaigen to Mr. James Stewart, Legal Officer, Ombusdman's office.

[8]See Appendix C.

[9]September 11, 1978. G.O. Koistinen to Mr. & Mrs. Dewald.

[10]J.A.S. Wilcox, Environmental Assessment: A Case Study of Great Manitou Island, Lake Nipissing (Unpublished thesis, University of Western Ontario, April 1979).

[11]Correspondence and other material related to the Great Manitou Island case on file at the Ontario Municipal Board is public information.

[12]Ibid.

[13]Wilcox, pp. 29-30.

[14]OMB file.

[15]Morris Memorandum, OMB file, pp. 2-3.

[16]August 1978. Letter to Minister of Housing from Lake Nipissing Wilderness Group.

[17]Notes of Lynn Beak, taken during attendance at hearing.

CHAPTER 8

CONCLUSIONS

This study has been limited in time and funding, such that the main emphasis has, of necessity, been descriptive. The main sources of information have been government agencies and officials, and, other than a review of the transcript and briefs of earlier hearings, no attempt was made to survey inhabitants of the North.

Nonetheless, we believe that we can usefully and realiably report some general observations and conclusions. Questions arising out of some basic issues cannot be avoided:

- who is the Ministry of Natural Resources planning for?
- what criteria are used by the MNR in making land use allocations and decisions? How are these criteria ordered? How are conflicts resolved?
- what criteria are used in determining who should receive valuable dispositions of resort land, exploratory licences and timber leases?

There are conflicting views, especially within MNR, as to the purpose of MNR plans. Are they to co-ordinate a limited set of ministry objectives, or are their goals

comprehensive enough to embrace all concerns? The prevailing theory is that each ministry must be expected to achieve its objectives, and thereby balance a MNR orientation in MNR plans. However, it appears that such a balance cannot be achieved under present circumstances.

MNR planning and decision-making by their very nature have a comprehensive impact on all aspects of life North of 50°. The resources planned and allocated - timber, minerals, fish and wildlife and recreation lands - constitute the entire economic base. The ecology is undiversified and fragile, and is of necessity significantly impacted by major developments, especially lumbering. Thus any decision about land use - what, where, how, how much and who - affects local residents and determines the economic underpinnings of their society.

Although residents North of 50° elect MPP's it is ridiculous to expect these representatives to act as the planning board, environmental hearing board and court of appeal to MNR decision-making. The legislature itself is almost completely non-involved in determining the plans, policies and priorities of ongoing Ministry programs.

Because of the wide ranging impacts of MNR decisions, one cannot expect the Minister in exercising his discretion, advised by his civil servants, no matter how

well-meaning or enlightened they are (or unbiased he is), to always have due regard to all conflicting values and objectives.

There must be established, through amendment to MNR legislation and through utilization of the Environmental Assessment Act, mechanisms whereby due process, and all that implies, can be guaranteed to affected persons; and to provide for a holistic view of impacts and to determine the long term public interest in an accessible, open and comprehensible forum.

In this report we have identified clear deficiencies in MNR legislation and administrative pratices. We are led to the firm conclusion that The Public Lands Act, and aspects of other MNR legislation, need to be rewritten to provide

- standards and procedures for effective public participation;
- due process for those directly affected by MNR decisions;
- elimination of redundancy and modernization of the legal instruments used to plan, zone and dispose of land.

The Environmental Assessment Act bears the seed of a useful process to ensure that the larger decisions of programs, policies and planning are exposed to meaningful

and guaranteed public input and comment. Its applicability must be clarified, however, by regulation or amendment to legislation, if necessary, to ensure that assessment of land use and management plans is appropriately timed and logically ordered.

MNR must be relieved of its dual role as custodian and resource developer. The internal conflict inherent in such a dual role almost ensures that one or the other takes low priority. Other ministries, and particularly MOE, must assert the priorities of ecological protection, to provide healthy balance and to ensure a clear enunciation of priorities to be established by the government and a clear and public delineation of the trade-offs involved.

We trust this paper will be useful as a descriptive handbook of administrative and legal practices; given the mandate of the Fahlgren Commission, we hope we have provided signposts indicating the direction of future studies, research and detailed recommendations to the Government of Ontario regarding accessibility and due process in decision-making North of 50°.

APPENDIX A

EXCERPTS FROM

MINISTRY OF NATURAL RESOURCES
STRATEGIC LAND USE PLANS
NORTHWESTERN ONTARIO PLANNING REGION

PHASE I
BACKGROUND INFORMATION AND APPROACH TO POLICY, 1974

PHASE II
PROPOSED POLICY, 1977

Phase I: FORESTRY

Approach to Policy, pp. 116 - 117

The general policy intent is to utilize the full allowable cut and to provide a continuous contribution of benefits. The present cut is 2.5 million cunits and the allowable cut is about 6.3 million cunits, a significant to major increase in benefits is planned. Present funding for forest production will allow for the continuous production of 3.5 million cunits after the year 2020.

Discussion:

Present benefits from forestry are some 15,000 primary jobs (in the woods and mills) and about $250,000,000 in value of production. The proposed policy would likely result in at least a doubling of these benefits. Recent trends in the Northwestern Ontario Planning Region have suggested that the total allowable cut for the area will soon be completely allocated. Some serious concerns in this regard are:

(a) While the Strategic Land Use Plan is in preparation more of the allowable cut is being allocated. Total allocation of the allowable cut may preclude some options for land use and cause costly readjustments in the future.

(b) The very rapid expansion of the forest industries in Northern Ontario may cause urban growth problems such as shortage of houses.

(c) Disaster contingencies for such things as fire or windthrow should be more fully considered.

(d) Major potential conflicts with timber use are wilderness parks and natural environment parks.

(e) Insofar as forestry operations will be greatly expanded, major efforts will be needed to make it as amenable as possible to other land uses. A strong implementation policy re cutting practices will be needed.

(f) The general policy intent should be to utilize the full allowable cut that is consistent with all the needs of the client group - not simply to utilize the cut.

(g) Present level of funding for forest regeneration must be increased greatly if the benefits from forestry are to be continuous.

Phase II: FORESTRY

Proposed Policy, pp. 35 - 37

TO SUSTAIN THE COMMITTED ANNUAL PRODUCTION LEVEL OF 6.3 MILLION CUNITS FOR THE NEXT 20 YEARS, AND PRODUCE THE MAXIMUM VALUE ADDED TO THE PROVINCIAL ECONOMY FROM THE FOREST INDUSTRIAL UTILIZATION OF THIS RESOURCE THROUGH SOUND FOREST MANAGEMENT PRACTICES CONSISTENT WITH THE NEEDS AND OBJECTIVES OF OTHER FOREST USERS.

TO MEET THE TARGET FOR JOBS (5,000) AS STATED IN THE DESIGN FOR DEVELOPMENT - PHASE II - NORTHWESTERN ONTARIO.

TO EXPLORE AND IMPLEMENT MEANS OF INCREASING THE PRODUCTIVITY FROM ALL LANDS PRESENTLY COMMITTED TO FOREST PRODUCTION, WITH THE EMPHASIS ON YOUNG FOREST STANDS WITHIN PRESENTLY ACCESSED AREAS.

NO LAND SHALL BE WITHDRAWN FROM FOREST PRODUCTION UNTIL THE TIMBER POTENTIAL HAS BEEN ASSESSED BY THE DIVISION OF FORESTS.

Discussion:

It is possible to achieve the above short-term policies within the Northwestern Planning Region. The commercial forest resources of the region have been committed, just below the current allowable cut. This presently available allowable cut from the exploitable forest area (Map #3) has been conservatively estimated at 6.3 million cunits of all species from the natural forest. This same area under more intensive management is capable of producing an estimated 7.6 million cunits annually. These volumes will be produced from approximately 40 million acres of productive forest land.

The recent expansions of various industries will give them a potential capacity to use more than the 6.3 million cunits. These companies presently draw about 700,000 cunits from outside the planning area. If this supply was removed, the forest industrial facilities in the Northwestern Planning Region may be undersupplied.

It is possible that because of other more economically advantageous uses of the land base, the required fibre demands will have to be met from a smaller land base. If this is the case, then management must ensure that a greater yield per acre is obtained immediately or lower the level of sustained yield allowable cut.

The former could be attained by increased utilization of all tree species. Such improved utilization is primarily dependent upon fibre markets which in turn are influenced by export demands. Various management techniques can also increase the potential yield over the long term but at an increased cost. Policy approved in 1972 provided funds for regenerating sufficient cut-overs to be able to attain a sustained yield of 3.5 million cunits by the year 2000 within this planning region. This policy is under review as a result of the recent approved industrial expansion.

With sound forest management programs aimed at meeting the needs of all the forest users many of the apparent conflicts can be minimized. For instance, harvesting designed to enhance good regeneration and maintain wildlife habitat will generally be suitable for most recreational purposes for sixty of the eighty years of the rotation and for hunting throughout the full eighty years.

Phase II: FORESTRY

Proposed Policy, pp. 35 - 37

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With sound forest management programs aimed at meeting the needs of all the forest users many of the apparent conflicts can be minimized. For instance, harvesting designed to enhance good regeneration and maintain wildlife habitat will generally be suitable for most recreational purposes for sixty of the eighty years of the rotation and for hunting throughout the full eighty years.

Phase I: MINING

Approach to Policy, pp. 118 - 119

General policy is to strengthen the contribution of minerals to the economy. First priority is to expand the extraction of minerals. It must be emphasized that a healthy mineral industry depends on a satisfactory rate of discovery to replace ore extracted. Therefore the expansion of geological knowledge and the role of exploration must be recognized. It is important that lands should not be withdrawn from mining until exploration is completed.

Second priority is to increase mineral processing. It should be noted that processing is encouraged now by the fact that no raw mineral products may be exported without special permission from the Minister.

For structural materials such as sand and gravel, the policy is to meet the demand as indicated by market requirements.

Discussion:

Benefits from mining were some 4,000 jobs and the value of production about 210 million dollars in 1972. It is assumed that a policy to strengthen the contribution might well mean a significant increase in benefits. This could mean up to 50 percent increase in benefits, however the extent of the increase is difficult to predict.

Some concern is felt over the apparent conflict between the welfare of society in general and the goal of developers. While the goal of developers appears to be a quick maximum profit, society in general requires some form of optimization and continuous benefits.

The obvious conflicts for mining are (1) arbitrary withdrawal of land from staking. (2) parks and park reserves - as long as these are exclusive uses there will be conflict. (3) unnecessarily restrictive or variable pollution standards. (4) disposal of land before aggregate extraction under reasonable control.

Phase II: MINING

Proposed Policy, pp. 39 - 40

THE GENERAL POLICY IS TO STRENGTHEN THE CONTRIBUTION OF MINERALS TO THE ECONOMY OF NORTHWESTERN ONTARIO. IN ORDER THAT THE GENERAL POLICY CAN BE REALIZED, THE FOLLOWING POLICIES ARE ADVOCATED.

1. NO LAND SHALL BE WITHDRAWN FROM STAKING UNTIL THE MINERAL POTENTIAL HAS BEEN REVIEWED BY THE DIVISION OF MINES, AND THE AMOUNT OF LAND HAVING HIGH AND MODERATE POTENTIAL EXCLUDED FROM MINERAL EXPLORATION SHALL BE MINIMIZED.

2. EXPLORATION FOR VIABLE MINERAL DEPOSITS SHALL BE ENCOURAGED BY EXPANDING THE GEOSCIENCE DATA BASE THROUGH SURVEYS AND THE COLLECTION, STORAGE AND DISSEMINATION OF INFORMATION.

3. THE EXTRACTION OF MINERALS SHALL BE ENCOURAGED TO MEET THE TARGET FOR NEW JOBS (2,000 - 3,000) STATED IN DESIGN FOR DEVELOPMENT - PHASE II - NORTHWESTERN ONTARIO.

4. THE PROCESSING OF ORE IN CANADA, AND WHEN ECONOMICALLY FEASIBLE IN NORTHWESTERN ONTARIO SHALL BE ENCOURAGED.

5. FOR STRUCTURAL MATERIALS (SAND AND GRAVEL) THE POLICY IS TO MEET THE MARKET DEMAND FOR ONTARIO IN GENERAL AND NORTHWESTERN ONTARIO IN PARTICULAR. MAXIMUM BENEFITS ARE TO ACCRUE TO THE RESIDENTS OF NORTHWESTERN ONTARIO.

6. THE ALIENATION OF AGGREGATE RESOURCES FROM CURRENT OR FUTURE EXTRACTION WILL BE MINIMIZED.

Discussion:

Of all primary industries in Ontario, mining is first in value of production. Due to the unpredictable nature of mineral discovery, it is difficult to forecast the exact extent and timing of the increase in benefits which will result from the above policy statement. Mineral exploration and extraction both provide significant benefits which could increase markedly.

The policy relative to exploration is given because a healthy mineral industry depends upon a satisfactory rate of discovery to replace ore extracted. It is therefore important that policies of other disciplines

do not unnecessarily discourage mineral exploration. It is also important that the land base suitable for mineral exploration should not be further reduced unnecessarily.

With respect to aggregate, a necessary consideration must be the principle of sequential use so that aggregate resources are not unnecessarily removed from exploitation.

APPENDIX B

SUMMARY OF TRANSCRIPTS OF THE PRELIMINARY HEARINGS OF THE ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

PRELIMINARY HEARINGS OF THE ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

Review of the testimony and briefs presented at the preliminary hearings of The Royal Commission on the Northern Environment provided a very refreshing and direct exposure to the realities of the north, unfiltered through political or bureaucratic channels. Contributors to the hearing represented a wide spectrum of both the local population and outside interests. Private individuals included fur trappers, nurses, lawyers, housewives, teachers and business people. Contributing groups included Indians, local business associations and multi-national corporations. Government bodies, including local municipalities, school boards, provincial ministries, and Crown corporations, presented their policies.

The submissions ranged from personal spontaneous remarks to professionally conducted studies and covered the gamet from child care to natural resource extraction. The written submissions were planned with a great deal of care and the local people especially seemed to put their heart into it, obviously wanting to take the Commission seriously despite their cynicism. One sensed a feeling of desperation in some;

that they were trapped by forces which they were powerless to influence and outraged by what they perceived to be injustice. Some of their complaints were common to those of most Canadians, others were peculiar to their situation as a sparsely settled region with a harsh climate and no political clout.

In reviewing the transcripts, attention was concentrated on those aspects of the submissions which dealt with land use planning and environmental matters. With respect to those subjects, special attention was given to the concerns expressed by the local residents. Thus, the following text represents a summary of material available in the RCNE library, with no attempt made here at evaluation or analysis of the contributions.

With respect to planning, the most fundamental complaint concerned lack of local involvement in the decision-making process. They felt that they were perceived mainly as a colony and source of raw materials by the rest of Ontario, their lives controlled by the insensitive machinery of big government and big industry. This was expressed by local municipalities, as well as reserve Indian bands and private citizens. They felt that planning took place between senior levels of government and industry and they were informed

after the fact, if at all. Because of their lack of political power they also found it difficult to demand efficient and reasonable service from those government ministries with which they dealt. Proposals included informing and consulting with municipalities and school boards in advance of decisions, retaining local planning boards, decentralization of provincial bureaucracy in order to give more decision-making power to civil servants in the north, creation of a northern resources control board, establishment of some form of regional government and finally, the proposal for creation of a new province of Northern Ontario.

It was said that northerners find it extremely difficult to obtain land for the purpose of building homes, businesses or cottages because most is frozen Crown land or patented mining claims. It was suggested that regulations could be devised which would allow purchases for legitimate needs while protecting the land from exploitation. Metis and non-status Indian people complain that they were no longer allowed to build on unorganized land but could not afford to buy serviced land in municipalities.

Thus, they said a housing shortage existed due not only to lack of land but also to imposition of southern standards and problems with financing. For example, the requirement

that sewage systems be buried meant, in the case of the north, blasting through solid bedrock. Because many of these municipalities have a weak tax base, financing such servicing schemes creates impossible hardship. New formula are needed to obtain revenue from residents and industries located outside the municipal boundaries but who nevertheless draw upon their services. Municipalities need more financial stability in terms of five year funding commitments from the provincial government. Because of changes in The Mining Act, mining companies are no longer allowed to deduct expenditure for community services such as housing and recreational facilities.

The question of where the native people fit in the scheme of provincial and municipal government was omnipresent in the hearings - touching upon most every subject area. Indians expressed disillusionment with their dealings with white society having been betrayed by the treaty and subsequent development which had almost invariably affected them adversely. The Indians want self-government on the reserves and they want to be included in the decision-making process with respect to anything that effects them. Because the Indian way of life involves a close relationship to and great dependence upon the land, land use decisions affect them quite drastically. They are cynical about the possibility of mitigating the effects of most forms of development because

in the past the trade-offs to them have not been equal. The poor and often inappropriate health, education and hard services they receive cannot begin, they said, to compensate for what they have lost in terms of their livelihood and a coherent lifestyle. Not only are the larger areas upor which they depend for their game and fishing often affected, but the limits of the reserve are not respected. The Crown can give mining rights on reserve land to outsiders without the Indians' permission, nor do the Indians benefit from the wealth extracted. Thus, consideration must be given to where the reserve band Indians fit legally into the provincial scheme of land use planning.

White and Indians alike were almost unanimous in their call for diversification of the economy of the north. Currently, they live with a highly unstable "boom and bust" economy dependent upon resource extraction industry. They called for policies of long term harvesting of renewable resources and production of more finished products in the north. While there was a difference of opinion as to the role of multi-national corporations, with some whites approving of their presence, most felt more emphasis should be given to small business and local initiatives. Freight rates and tariff agreements which are lower for unfinished material are obstacles to this goal as well as government policies favouring large multi-nationals.

The locals felt that the MNR policy of giving licenses to large companies rather than local operators is especially pernicious. They gave examples of discrimination with respect to timber leases and also of successful Indian businesses developed in cases where they had been given licenses.

Protection of the environment was a paramount concern to almost all northern residents appearing at the hearing. There were differences here of course, with some whites encouraging large projects subject to environmental controls, and most Indians fearful that large scale development would destroy their livelihood. Some whites felt the government went to extremes in being too lax for too long and now too strict in some cases. Many feel that there should be a moratorium on development during the Royal Commission study, if the commission is to retain its credibility.

Industrial representatives requested that environmental assessment process be streamlined so that they could deal with a single agency, jurisdiction and procedure. They were prepared to comply with pre-established criteria but found it difficult to cope with prolonged indecision and shifting standards blown by the political wind.

Virtually everyone called for a better definition of the inter-relationships and responsibilities of various ministries, particularly with respect to responsibility for timber cutting and reforestation, in which the MNR, industry and the MOE were said pass the buck back and forth.

Municipalities complain that they are held to more stringent standards with regard to landfill sites than are industry and higher levels of government. They also felt that controlled burning was acceptable in the sparsely populated northern environment. They also pointed to lack of adequate machinery to regulate tourist camps and private aircrafts.

APPENDIX C

REPORT OF THE OBMUSDMAN

DECEMBER 3, 1979

REPORT OF THE OMBUDSMAN'S OPINION, REASONS THEREFOR AND RECOMMENDATIONS, FOLLOWING HIS INVESTIGATION INTO THE COMPLAINT OF MR. & MRS. GERHARD DEWALD

Mr. John Swaigen, counsel to the Canadian Environmental Law Association, first brought the complaint of Gerhard and Evelyn Dewald against the Ministry of Natural Resources to the attention of my Office in a letter dated December 23, 1975; Mr. and Mrs. Dewald wrote to my Office themselves on March 10, 1976.

The subject matter of the complaint was the decision of the Ministry of Natural Resources respecting the location of a commercial use site on a lake where the complainants owned a summer cottage property, which they intend eventually to use as a retirement home; it was alleged that the Ministry's decision created a serious land use conflict. The complaint also concerned the omission of the Ministry to give the complainants notice of the proposed location of the commercial use site, or to provide for any opportunity for public participation in the planning decision.

Following a review of the documentation submitted by the complainants, a letter was written from my Office on August 24, 1976, advising Dr. J.K. Reynolds, the Deputy Minister of Natural Resources, in accordance with section 19(1) of The Ombudsman Act, of the Ombudsman's intention to make an investigation. The complaint of Mr. and Mrs. Dewald was capsulated, and the Deputy Minister was invited to provide us with a statement of his Ministry's position on the complaint.

On the same date, a similar letter was sent to Mr. Everett Biggs, who was then Deputy Minister of the Environment. A response was received from him, but the focus of our subsequent investigation was upon the Ministry of Natural Resources, since the basic problem was one of land use, a matter more within the jurisdiction of the latter Ministry.

On September 20, 1976, we received the position statement of the Ministry of Natural Resources from Dr. Reynolds, who enclosed in his letter a summary of background information on the case and a copy of the Lake Development Plan for Waweig Lake.

The file was assigned to Mr. Gary Giuliani, an investigator on my staff, for investigation. Mr. Giuliani had already visited the site of Mr. and Mrs. Dewald's cottage on Waweig Lake, north of Thunder Bay, and the site of the commercial use establishment on August 26, 1976. During the course of his inquiries, Mr. Giuliani obtained information

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from the following officials of the Ministry of Natural Resources: Mr. G.O. Koistinen, District Manager, Nipigon District, North Central Region; Mr. L. Affleck, Deputy Regional Director, North Central Region; Mr. R.A. Baxter, Regional Director, North Central Region; Mr. J. Hamill, Regional Lands Administrator, North Central Region; Mr. J. Morton, Supervisor, Public Lands Section; and Mr. J. McGinn, then Director of Lands Administration. Mr. Giuliani also received information from Mr. J. Harney, Senior Environmental Officer, Industrial Abatement Section, Ministry of the Environment; Mr. Plumridge, who is currently leasing the commercial site in question; and Mr. and Mrs. G. Dewald.

Following a telephone conversation between Mr. Dewald and Mr. Steven Howarth, who was then an investigator on my staff, on April 10, 1978, the file was closed, in the belief that the complaint had been resolved. However, our investigation was reopened, following a meeting of Mr. Swaigen and the complainants with my predecessor, Mr. Arthur Maloney, Q.C., on May 15, 1978. The file was assigned to Mr. James Stewart, a Legal Officer on my staff. Mr. Stewart obtained further information from Mr. William Small, of the Public Lands Section of the Lands Administration Branch of the Ministry; Mr. J.R. McGinn, the Director of the Ministry's Lands Administration Branch; and, through them, from Mr. G.O. Koistinen, the District Manager of Nipigon District in the Ministry's North Central Region. As well, Mr. Stewart spoke to Mr. Swaigen, and obtained information from Mrs. Evelyn Dewald.

During the course of our investigation, the special focus of our inquiries became the procedures followed by the Ministry in designating the commercial use location on Waweig Lake and in developing and approving the Lake Development Plan for Waweig Lake. In this regard, our particular concern was the degree to which members of the public, and particularly the complainants, had been involved in the planning process. It appeared to me that there might be sufficient grounds for my making a report or recommendation that might adversely affect the Ministry of Natural Resources. Accordingly, in a letter dated June 29, 1979, addressed to Dr. Reynolds, the Deputy Minister, I outlined the possible conclusions and recommendations I had under consideration, and, in compliance with section 19(3) of The Ombudsman Act, invited him to make representations respecting them. The representations of the Ministry were received from Dr. Reynolds on August 20, 1979.

Finally, we obtained a copy of the Ministry's draft Guidelines for Land Use Planning (November 1979) from Mr. E.M. Cressmen, Supervisor, Land Use Liaison, in the Ministry's Land Use Coordination Branch.

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I would like now to give a brief fact summary in relation to this case. It is my understanding that Mr. Dewald purchased his summer cottage lot from the Ministry of Natural Resources in July of 1962. His lot is described as Summer Resort Lot #14, on Waweig Lake, south of Armstrong, as shown on Plan M-219, filed in the Office of Land Titles at Thunder Bay. He was issued Letters Patent for the land in 1965.

There was no further development on Waweig Lake until 1972, when the remaining thirteen lots in the subdivision were leased to members of the public. As well, Mr. Robert Smith, a tourist outfitter, applied on January 20, 1972, to lease Crown land and to occupy a water lot. Mr. Smith intended to use the land as a base for aircraft, for guest accommodation, parking, and the storage of gasoline. The water lot was to be used for the purpose of erecting a dock. The chief purpose of Mr. Smith's request to lease a commercial site on Waweig Lake was to establish a road base to supply his fly-in resort on Smoothrock Lake, located approximately twenty air miles northwest of Armstrong.

The commercial site on Waweig Lake, as approved by the Ministry, is described as Location RK 870 (Part I on Plan 55R-1843), and the water lot juxtaposed to it is described as Location CL 1589. The commercial location is separated from the complainants' lot, which is the southernmost in the sub-division, by 500 or 600 feet of forested buffer zone.

Apparently, the finalization of the Crown lease to Mr. Smith was delayed because of a survey problem respecting the rear boundary line of location RK 870. Mr. Smith's applications were eventually cancelled by the Ministry on January 15, 1976, for failure to meet the terms of the proposed lease and licence of occupation. However, during the years 1972, 1973, and 1974, Mr. Smith operated a gasoline station and float plane fly-in service at his commercial location.

Mr. Smith's commercial use gave rise to complaints by Mr. and Mrs. Dewald about noise. Electricity for Mr. Smith's operations was supplied by a diesel generator, which operated all day and all night, seven days a week, throughout the tourist season. The Dewalds complained about the noise made by the generator. They also complained about the aircraft, which they said flew in or took off every half hour, and, apart from creating a noise disturbance, constituted a hazard to them when they were swimming.

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The complainants were in touch with local Ministry officials, with the Minister himself, then the Honourable Leo Bernier, and eventually with the Minister of the Environment, then the Honourable James Auld. In July of 1974, the Ministry of the Environment conducted a noise survey in relation to the diesel generator on Mr. Smith's site. Mr. J.E. Harney, Senior Environmental Officer, who made the measurements, concluded that the noise levels on the Dewalds' property were not excessive, and were well below the proposed maximum permissible sound levels for urban residential areas. However, he noted that no base level had yet been established for rural residential areas. As well, Mr. Harney noted that low frequency noise might be more evident during the night hours, when the relative humidity was higher, and the background noise level lower, in relation to the sound emitted by the generator. In any event, the Ministry of the Environment did not support the Dewalds' complaint about noise.

It is my understanding that since Mr. Smith removed his operation from Waweig Lake, Mr. and Mrs. Dewald have had no complaint about noise, and I will touch upon this later. However, they still fear, because of their experience with Mr. Smith, that the present location of RK 870, given its designation, might lead in the future to a recurrence of problems.

On April 23, 1976, Mr. Donald Plumridge applied to the Ministry to lease commercial Location RK 870. Mr. Plumridge submitted a five year plan for the commercial development of the site, which included the construction of four cottages, a dock, a store, and a steam bath, for a total investment of approximately $60,000. On April 4, 1977, the Ministry granted a lease to Mr. Plumridge, and certain others, for a term of forty years, to commence on January 1, 1977. The site was to be used only for the purpose of a tourist establishment. This lease cannot be assigned or charged without the consent in writing of the Ministry.

More recently, in the fall of 1978, Mr. Plumridge applied for, and received, permission to operate a float plane fly-in service, which I understand he has been operating this year.

It is my understanding that the approach of the Ministry of Natural Resources is to develop the lakes in northern Ontario to serve a multiciplicy of uses, in order to take advantage of limited facilities, such as roads, and to take into account a number of different interests.

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The Ministry prepared its first plan for Waweig Lake in 1971, taking into account the cottage subdivision, and providing for such matters as public access to the lake and commercial development. The site of commercial Location RK 870 was chosen by Ministry of Natural Resources staff, apparently after a field survey revealed it to be the only suitable area, in the Ministry's view, for a commercial establishment, given factors of topography and access. The proximity of Location RK 870 to the Thunder Bay-Armstrong road was apparently one of the major considerations in determining suitability. It was expected that the site would be used as a road base for a fly-in resort.

Mr. G.O. Koistinen, District Manager, Nipigon District, explained that the site, about 600 feet south of the lot owned by the complainants, and separated from it by a forested buffer, was acceptable to both Mr. Gordon Smith, the original applicant for the site, and the Ministry of Natural Resources. The complainants, on the other hand, say the site was not acceptable to them, and maintain that the commercial designation of this particular location created a land use incompatible with the quiet enjoyment of their summer resort lot.

The complainants were never given notice of the Ministry's proposal to designate the site in question for commercial use. They had no opportunity to voice any objections before the site designation was made and approved. They simply discovered the commercial use in operation upon their arrival at the lake in 1972.

Subsequently, however, in July of 1975, a draft Lake Development Plan for Waweig Lake was circulated to the Waweig Lake cottagers for their comments. The draft plan had earlier been approved at the District level. This plan incorporated certain of the features of the earlier plan, including the commercial location.

On August 1, 1975, Mrs. Dewald wrote to the District Manager, Mr. Koistinen, with her comments. Mr. John Swaigen, of the Canadian Environmental Law Association, whom the complainants had retained to represent them, sent a telegram objecting that the commercial zone in the draft plan was located too close to the complainants' property and asking that no approval be given to the plan before further discussion.

The Regional Director, Mr. R.A. Baxter, solicited input from other Ministries on the draft plan. (The Ministry of the Environment commented only on the problem of solid waste disposal, and made no comments about any potential noise problems associated with the commercial establishment).

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On May 19, 1976, the Lake Development Plan was approved at the Regional level. It is my understanding that final approval was given by the Ministry's Land Use Coordination Branch in Toronto sometime in November of 1976. The primary role ascribed to Waweig Lake by the Plan was to provide private cottaging experiences for people. In addition, there were to be some public reserves. The Plan also incorporated the existing commercial development, namely, Location RK 870.

More recently, when Mr. Plumridge applied for permission to operate his commercial fly-in service, the Ministry convassed the opinions of the cottagers on Waweig Lake in order to find out whether they objected to a commercial seaplane base operating on the lake, and whether they felt the aircraft landing and taking off represented a safety hazard. Ten replies were received, of which eight approved the fly-in service and two opposed. The complainants were among those who opposed, and their response was made by their lawyer, Mr. Swaigen. In his letter, dated September 21, 1978, and addressed to Mr. Koistinen, the District Manager, Mr. Swaigen outlined the nuisance which he contended the commercial use designation of RK 870 had created for the complainants. In addition, he requested that the Ministry provide him with information, so that he could better direct his submissions, but no further information was provided to him.

On October 6, 1978, Mr. Baxter, the Regional Director, authorized Mr. Koistinen to issue the necessary authority to Mr. Plumridge so that the latter could operate an aircraft from his dock on Waweig Lake. On October 12, 1978, Mr. Koistinen wrote to Mr. Swaigen to advise him of this decision.

(The actual granting of the licence and operating certificate for the aircraft, of course, is a responsibility of the federal governmental authorities.)

It is my understanding that Mr. and Mrs. Dewald have no complaint about the manner in which Mr. Plumridge has operated the commercial location. They have not been bothered by noise from the generators he operates on the property, nor have they been disturbed by his float airplane. Mr. Plumridge has apparently gone out of his way to avoid disturbing the complainants, and relations between them are good. This is in contrast to the situation which existed when Mr. smith was running his commercial operation.

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The Ministry's planning decisions were made under the authority of certain provisions in The Public Lands Act. I do not intend to deal with these provisions in any detail. Under section 16(1) of the Act, the Minister may establish zoning plans, for the purpose of management of public lands. Under section 16(2), the Minister may require plans of subdivision to be drawn up in respect of summer resort locations. Under section 17(1), the Minister may designate restricted areas in a territory without municipal organization, and may issue permits for the erection of buildings or structures or the making of improvements on lands in any such areas, upon such terms and conditions as he may consider proper. Section 23(1) empowers the Minister to issue a licence of occupation to any person who has purchased, or is permitted to occupy, or is entrusted with the care or protection of any public lands, or who has received or been located on any public lands as a free grant. The mention of these provisions is not exhaustive; however, there is no doubt that the Ministry had the authority to decide what it did.

The provisions of The Public Lands Act do not require the Ministry to grant anyone a hearing, unlike the legislation governing the adoption of official plans and zoning by-laws in municipalities does. Any provision for public participation in the planning process, under The Public Lands Act, is purely a matter of Ministerial policy and discretion. As we shall see, the Ministry of Natural Resources has developed Guidelines for Land Use Planning which recognize the principle that public participation is essential in the planning process.

Section 22 of The Ombudsman Act empowers me to make a report and recommendations where I am of the opinion that, in the language of section 22(1)(b),

> "the decision, recommendation, act or omission which was the subject-matter of the investigation was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory."

In this case, I am not prepared to find that the decision of the Ministry to designate the particular location that it did for commercial use was "unreasonable, unjust, oppressive or improperly discriminatory". In my view, it is reasonable for the Ministry to develop a lake such as Waweig Lake in order to accommodate multiple uses, public, private, and commercial. The lake plan calls for private cottage use to be the primary use. With only one commercial location,

it appears to me that the commercial component of the lake development is modest indeed.

The Ministry knew that the commercial site was intended for use as a road base to supply a fly-in resort on a more remote lake. The supply base depended on road access and a waterway capable of handing float aircraft. According to the Ministry, the commercial location chosen on Waweig Lake was particularly suitable because of its proximity to the Armstrong road. As well, the Ministry's field survey revealed it to be a suitable area from the point of view of topography and access to the water. In my view, the Ministry was not unreasonable in taking factors such as these into account in making its decision. As well, the Ministry, in my view, attempted to accommodate the interests of the complainants by leaving a wooded buffer zone of approximately 500 feet between the commercial site and the cottage subdivision.

However, I can appreciate the concern the complainants have respecting the manner in which the commercial operation will be carried on, in view of their experiences with Mr. Smith. The basis for the contention that there is a land use conflict because of the location of the commercial use site in relation to the complainants' lot is the disturbance which the complainants suffered while Mr. Smith was on the commercial property. However, the present lessee has shown that Location RK 870 can be used in a manner which is reasonable and which does not detract from the quiet enjoyment of the complainants' property. In my view, this is a relevant factor to take into account when considering whether the Ministry's decision to designate Location RK 870 for commercial use was reasonable.

However, with respect to the lake development planning procedures followed by the Ministry, insofar as allowance for public participation was concerned, I am of the opinion that the decision of the Ministry respecting the commercial use site designation was made "in accordance with a practice that is or may be unreasonable," within the language of section 22(1)(b) of The Ombudsman Act. I have reached this conclusion because the Ministry made no provision for giving notice to the complainants of the proposed commercial use designation at the time the original lake plan was being developed in 1971. The commercial use site chosen was acceptable to both the Ministry and the original applicant for a lease, Mr. Smith, but the views of the complainants, who were the only other people occupying property on the lake at the time, were not solicited. In my view, it would have been an easy matter for the Ministry to have got in touch with the complainants, even in the off season.

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The Ministry has admitted that dialogue may have been lacking when this original decision was taken, although it maintains that if its practice was unreasonable, in that it did not make provision for giving notice, this is true by virtue of today's standards, and not those of the early 1970's, when Ministry policy apparently did not require public participation in planning activities. The Ministry's present policy does recognize the principle of public participation in planning activities, and I will comment upon this further below. However, I note now that the commentary on the principle that public participation is essential in the planning process set out in the Ministry's draft Guidelines for Land Use Planning contains the following statement: "Public participation means that the public takes part in the planning process rather than just reacting to decisions made." Unfortunately, at the time the first lake plan was drawn up, the complainants were put in the position of having to do just that, react to a decision which had already been made.

As noted earlier, Mr. Koistinen, the District Manager, wrote to the cottagers on Waweig Lake in July of 1975, in order to circulate amongst them a copy of the draft Lake Development Plan for Waweig Lake, and he invited their comments and suggestions. The complainants were given an opportunity, therefore, to make comments, and Mrs. Dewald did so in a letter dated August 1, 1975, and she objected to the commmercial site being located so close to her property. The Canadian Environmental Law Association also sent a telegram, alleging that the commercial zone was located too close to Mrs. Dewald's property, and objecting to any approval of the draft plan before further discussion.

On December 23, 1975, Mr. Swaigen wrote to Mr. Koistinen, requesting information about what steps the draft plan had to go through before final approval was given. In particular, he wished to know whether the approval was subject to The Planning Act, and whether there was any public hearing before the Ontario Municipal Board or some other body. Mr. Swaigen also asked if there was a local advisory committee with a role to play in the approval or modification of the plan. Mr. Koistinen replied to Mr. Swaigen on January 19, 1976. He described the steps involved in the approval of draft plans, and explained that this approval was not governed by The Planning Act, nor was a public hearing before the Ontario Municipal Board necessary. As well, he said that no local advisory committee was involved in the Lake Development Plan for Waweig Lake.

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On September 11, 1978, Mr. Koistinen again wrote to the cottagers on Waweig Lake soliciting their views on whether or not the Ministry ought to allow the commercial site to be used as a seaplane base. The response of the cottagers, including the complainants, and their counsel, has been noted above.

It is clear, therefore, that the Ministry provided for some public participation in the planning process with respect to the 1975 lake plan, and the further issue of whether or not the commercial location ought to be used as a float aircraft base. (I note that the Ministry takes the position that the commercial use of water-based aircraft, and the noise and safety problems associated with this, are primarily a federal concern, and that members of the public could make objection to the appropriate federal authorities in respect of any application to operate a fly-in service. However, although the operation of air services is indeed a matter which comes within the jurisdiction of the Canadian Transport Commission and the federal Department of Transport, in my view, the Ministry of Natural Resources, being aware of the purposes to which the commercial use site was to be put, namely, as a base for aircraft, still bears responsibility for taking these purposes into account in making its own planning decisions.)

The lake plan approved by the Ministry in 1976 incorporated features contained in the earlier plan, including the location of the commercial use site, to which the complainants had been objecting since 1972. Although I am not prepared to find that the Ministry's decision respecting the designation was unreasonable in itself, I am of the opinion that the procedures followed by the Ministry still omitted to make adequate provision for the complainants, or their counsel, to have access to the information upon which it was intended to base the decision respecting designation; there was no opportunity to question planners who were responsible for making the designation, both at the time of the original application in 1972, and subsequently, when the 1975 draft plan was under consideration; nor was there any kind of hearing before final approval was given. In reaching this conclusion, I am aware that The Public Lands Act does not require the Ministry to grant a hearing, and the involvement of the public is dependent upon the Ministry's internal policies and administrative practices.

In considering what recommendations were open to me to make, I have taken into account the representations made on behalf of the Ministry by Dr. Reynolds, the Deputy Minister. In particular, I have taken into account the

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draft Guidelines for Land Use Planning. The Deputy Minister has pointed out that public participation in the Ministry's planning acitivities, even a decade ago, was much less formalized, and perhaps less effective, than it is today. Since 1974, the Ministry has had a land use planning guideline which has recognized the importance of public involvement in planning (the draft Guidelines referred to above, I understand, are the most recent version). The Deputy Minister has said that as the Ministry's expertise in land use planning develops, Ministry officials will undoubtedly increase their ability to involve the public in planning programs.

In my view, there has been an evolution toward greater public participation in the planning process which is evident in the present Ministry administrative practices. I believe the Ministry should be commended for this. The present draft Guideline, while providing that decision making remains the prerogative of government, recognizes that public participation means that the citizens concerned with the planning area take part in the planning process, rather than react to decisions made. The development of a public participation program is an integral part of the planning process, which Ministry planners must take into account. A number of methods of involving the public are described in the Guideline. My only concern is that the Guideline nowhere recognizes any minimum standard of public participation.

As noted above, the complainants, along with other cottagers, were permitted to make comments on the draft Lake Development Plan in 1975, and upon the proposal to allow a commercial float aircraft operation on the lake in 1978. However, it is questionable whether any real "dialogue" took place, especially when Mr. Swaigen, who was acting on behalf of the complainants, was not given the opportunity to participate in any forum, formal or informal, where he could have examined the basis for the planning decisions, and questioned the planners involved.

I recognize that it would not be an easy task to formulate a standard approach to the question of public participation which would be applicable in all situations. However, it is my view that the Ministry should be prepared to set certain minimum requirements, especially where there has been a great deal of interest expressed on the part of certain members of the public and even a history of complaints, and counsel acting for those members of the public requests information and an opportunity for a hearing.

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In making the above comments, I do not anticipate that there should be a hearing every time someone applies for permission to occupy a water lot; my comments are directed to the procedures which result in the preparation of overall plans for the future development of a lake, as in this case.

Accordingly, while recognizing and commending the present policy of the Ministry of Natural Resources with respect to public participation in the planning process, I recommend, pursuant to section 22(3)(d) and (g) of The Ombudsman Act, that the practice upon which the decision complained of was based be altered, and that further steps be taken to ensure that there is provision for notice, access to information, the opportunity to question planners, and the right to a hearing before final approval is given, in a case such as the present one. It is my further recommendation that the Ministry ensure that certain minimum requirements for public participation be set, so that members of the public have a real opportunity to enter into an effective dialogue with Ministry planners during the course of the planning process.

In my view, no further recommendations are appropriate in this case.

Dec 3, 1979
Date

Donald R. Morand
Ombudsman

APPENDIX D

GENERAL STATUTES
ADMINISTERED BY
THE MINISTRY OF NATURAL RESOURCES

1979

GENERAL STATUTES ADMINISTERED BY THE MINISTRY OF NATURAL RESOURCES

The Algonquin Forestry Authority Act, 1974

The Algonquin Provincial Park Extension Act, 1960-61

The Beach Protection Act

The Beds of Navigable Waters Act

The Canada Company's Land Act, 1922

The Conservation Authorities Act

The Crown Timber Act

The Endangered Species Act, 1971

The Fisheries Act (Canada) (Ontario Fishery Regulations)

The Fish Inspection Act

The Fisheries Loans Act

The Forest Fires Prevention Act

The Forest Tree Pest Control Act

The Forestry Act

The Freshwater Fish Marketing Act (Ontario)

The Game and Fish Act

The Gananoque Lands Act, 1961-62

The Gas and Oil Leases Act

The Industrial and Mining Lands Compensation Act

The Lac Seul Conservation Act, 1928

The Lake of the Woods Control Board Act, 1922

The Lakes and Rivers Improvement Act

The Migratory Birds Convention Act (Canada) - Ontario Regulations

The Mineral Emblem Act, 1975

The Mining Act

The Mining Tax Act, 1972

The Ministry of Natural Resources Act, 1972

The National Radio Observatory Act, 1962-63

The Niagara Parks Act

The North Georgian Bay Recreational Reserve Act, 1962-63

The Ontario Geographic Names Board Act

The Trees Act

The Wild Rice Harvesting Act

The Wilderness Areas Act

The Woodlands Improvement Act

The Woodmen's Employment Act

The Woodmen's Lien for Wages Act

An Act to Confirm the Title of the Government of Canada to Certain Lands and Indian Lands 1915

The Ontario Harbours Agreement Act, 1962-63

The Ottawa River Water Powers Act, 1943

The Parks Assistance Act

The Petroleum Resources Act, 1971

The Pits and Quarries Control Act, 1971

The Provincial Parks Act

The Public Lands Act

The St. Clair Parkway Commission Act, 1966

The Seine River Diversion Act, 1952

The Settlers' Pulpwood Protection Act

The Spruce Pulpwood Exportation Act

The St. Lawrence Parks Commission Act

The Surveyors Act

The Surveys Act

APPENDIX E

SUMMARY OF
PUBLIC LANDS ACT
BY SUBJECT

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THE PUBLIC LANDS ACT

MINISTER'S POWERS

Section 2 states "the Minister (of Natural Resources) shall have charge of the management, sale and disposition of the public lands and forests."

Sections 7, 8 and 9 stipulate that cabinet may make regulations to carry out the Act's provisions or "to meet cases for which no provision is made by this Act", it may appoint officers or agents to carry out the act and regulations, and can also carry out the powers conferred on the Minister by the Act.

PUBLIC RESERVES ON WATER FRONTAGE

Section 3: If public lands make up 25% or more of the total frontage on a water body then at least 25% of the total frontage shall be reserved for public recreation and access.

If public lands make up less then 25% of the total frontage then all public lands on that water body shall be reserved for public recreation and access.

SURVEYS AND PLANS

Section 11 allows the Minister to survey and subdivide public lands and to annul any such survey. If the survey or subdivision has been registered, then annulled, "the Minister shall" register an amended plan. If letters patent have been issued for any land affected by an annulment they are cancelled and reissued based on the amendment with retroactive effect to the date of the orginal letters patent.

Where in any instrument, including a Crown grant, the description differs from the original survey because of an error in the original survey re locations of lakes, rivers or streams or because the boundaries of the lot were not included in the original survey, the Minister can alter and register an amending plan. This is subject to the notice

provisions of section 48 of The Surveys Act.

GRANTS, SALES, LICENCES OF OCCUPATION, ETC.

Cabinet, under section 14 can make free grants of letters patent for up to four hectares (ten acres) for roads, wharves, market places, jails, court houses, public parks or gardens, town halls, hospitals, places of public worship, burying grounds, schools, agricultural exhibits, and other like public purposes. It can make free grants up to 100 acres for model or industrial farms. Such appropriation can be revoked at any time before the issues of the letters patent.

Under section 15 Cabinet can set apart public lands for research in, and the management, utilization and administration of, the public lands and forests.

ZONING PLANS

Under section 16 the Minister can establish zones 'such as "Open", "Deferred", "Closed" or otherwise as he considers proper'. He may define the purposes for which each class may be administered and can designate such areas on maps or plans. Any area of public lands so designated shall be administered only for the purposes defined for the designated class of zone.

Under section 16(2) "the Minister may designate areas in which the public lands are not open for disposition as summer resort locations until a plan of subdivision of the lands to be disposed of is registered under The Land Titles Act or The Registry Act".

Under section 17(1) "the Minister may designate any area in territory without municipal organization as

a restricted area, and he may issue permits for the erection of buildings or structures or the making of improvements on lands in any such area on such terms and conditions...as he considers proper.

Under section 17(2) no person can erect a building or make any improvement on any lands in any area without municipal organization that has been designated as a restricted area without a permit issued under this Act. Anyone who does is liable to a fine of not more than $500.00.

Section 17(4) states this section does not apply to the erection of buildings or structures or the making of improvements on lands for the purpose of the exploration or development of mines, minerals or mining rights.

REGULATIONS RE SALE OR LEASE OF PUBLIC LANDS

Under section 18 Cabinet may make regulations "prohibiting or regulating and controlling the sale or lease of public lands for any specified purpose or use, other than agricultural purposes, and fixing the prices or rentals and the terms and conditions of sale or lease. It can fix such terms and conditions of sale or lease as it considers proper and can fix the periods for which it may extend the time for performance of the sale or lease.

Under section 18(4) "the Minister may, whether or not the consideration has been fixed by the regulations, dispose of public lands by tender or by auction upon such terms and conditions as he considers proper".

Under section 18(5) where public lands offered for sale or lease by tender or auction are not disposed of, the Minister can sell or lease them later at such price and upon such terms as he considers proper.

Under section 18(6) where public lands are disposed of for summer resort locations the Crown shall reserve all mines and minerals and the instrument of sale or other disposition shall so provide.

Under section 19 where not otherwise provided for the Minister can set his own prices and conditions but no sale or lease shall be made of parcels of more than five hectares at less than $24.70 per hectare (sale price) or $12.35 per hectare (lease).

ADVERSE POSSESSION (Squatters)

Under section 20 "where a person has been in actual possession of public lands by himself or through his predecessors for more than sixty years, the Minister may cause a quit claim to be issued to such person...at such price and upon such terms and conditions as he considers proper".

LAND USE CONDITIONS IN LETTERS PATENT

Under section 21(1) the letters patent for land sold or leased may contain conditions that the land is to be used, or is not to be used, in a particular manner. If the land is used in violation of the condition in letters patent then under s.21(2) the Minister may apply to the courts for order forfeiting the land to the Crown and for possession.

Under section 22 the Minister may make an order releasing the land or part of it from any condition in the letters patent.

LICENCES OF OCCUPATION

Under section 23 the Minister can issue a licence of occupation to any person who has purchased, or is permitted to occupy, or is entrusted with the care or protection of any public lands or who has received or been located on any public lands as a free grant. There may be conditions in the licence but a possessor under a licence can "maintain actions against any wrongdoer or trespasser, as effectually as he could under letters patent from the Crown." Such licence has no force against a licence to cut pine trees existing at the time of its issue (i.e. a licence existing at that time). Where the pine trees are reserved to the Crown a licence of occupation has no force against an existing licence to cut such trees or such licence issued thereafter.

EASEMENTS

Under section 24 the Minister may grant easements in or over public lands for any purpose.

MINISTER'S POWER TO DETERMINE RIGHTS UNDER LETTERS PATENT

Under section 25 "The Minister has authority to determine all questions that arise as to the rights of persons claiming to be entitled to letters patent of land located or sold under this Act and his decision is final and conclusive." (What does this mean?)

CANCELLATION OF SALE

Under section 26 if the Minister feels that a purchaser etc. has been guilty of fraud or has violated any of the conditions of sale or lease or the licence, he can cancel the sale, etc., resume the land and dispose of it as if there had never been any transaction. On its face this section would seem to be in conflict with the provisions of section 21 allowing the Minister to apply to the court for an order forfeiting the land to the Crown.

S.27(2) If a person refuses to deliver up possession of any lands after the revocation, cancellation or expiration of the sale or lease or of a licence of occupation, or where he is on the lands without lawful authority, the Minister can apply to the courts for an order for possession.

S.27(3) After fifteen days notice by the Minister to vacate possession or to remove any building or structure the Minister may by his warrant require the person to deliver the lands to the person named in the warrant and he can authorize any person to remove the unlawful possessor or any building or structure or improvement from the land.

Section 27(5) notes that the order or warrant has the same force as a writ of possession. The sheriff, bailiff, or person to whom it is entrusted shall execute the warrant or order in like manner as he would a writ of possession in an action for the recovery of land. He may take with him all necessary assistance and has the right to demand such assistance in the same manner as the constable or other peace officer in the execution of his duty. Any resistence

or refusal to obey any such order or warrant can result in a fine of between $20 and $100 and to imprisonment for a term of not more than six months.

Any building or thing remaining on the lands after revocation or cancellation or expiration of the sale or lease as well as any building or thing on lands occupied unlawfully, is the property of the Crown.

It would appear then that the Minister can proceed either:
1. by court order or
2. by his own warrant.

Under section 28 an unlawful possessor who erects any building or makes any improvement is liable to a penalty equal to twice the market value of the public land as determined by the Minister. Such penalty is recoverable by the Minister in any court of competent jurisdiction.

UNAUTHORIZED FILLING IN (And Littering?)

Under section 29 "every person who without the written consent of the Minister or an officer authorized by the Minister throws or deposits or causes to be deposited any material, substance or thing upon public lands whether or not covered with water or ice, or both, is guilty of an offence and on summary conviction is liable to a fine of not more than $500.00.

SIGNS CONTROLLING USE

Under section 30 the Minister may erect signs on public lands or roads under his jurisdiction that prohibit control or govern (a) the possession occupation or use or uses thereof
(b) the parking of vehicles thereon.

Anyone who contravenes a condition on a sign and who has had a reasonable opportunity of seeing the sign can be liable to a fine of not more than $500.

ISSUES RELATING TO LETTERS PATENT

Prior to the issues of letters patent no public lands shall be alienated, mortgaged or charged without written consent of the Minister "except by devise or sale under the authority of any Act of the Legislature relating to taxation or statute labour". (What does this mean?) Nor is the land liable for the satisfaction of any debt or liability except by mortgage in favour of the crown.

Sections 32 to 38 deal with technical problems: arrears in rent (section 32);a grant to a dead person (section 33) the correction of mistakes in the letters patent (section 34); overlapping grants of letters patent (section 35); compensation for deficiency of land (section 36); registration of judicial repeal or avoidance of letters patent (section 37); the reduction in price of any public lands sold by the Crown before June 23rd, 1942, where it appears that the land was sold at a price beyond its fair value (section 38); and the annual transmission to each assessment commissioner appointed under The Assessment Act of a list of lands in the assessment region patented, sold, leased, etc., in the preceding year, and the list of cancellations of same (section 39).

CROWN GRANTS

"Crown grant" means a grant of a freehold or leasehold interest in unpatented public lands or of an easement in or over unpatented public lands made under this or any other Act. (See 40)

Section 40 notes that Crown grants are to be properly registered.

ACQUISITION OF PUBLIC LANDS BY MINISTRY EMPLOYEES

Section 41 "No person holding an office in or under the Minister and no person employed in or under the Minister shall directly or indirectly, purchase any right, title or interest in any public lands either in his own name or by the interposition of any other person or in the name of any other person in trust for himself without the approval of the Lieutenant Governor in Council".

DELEGATION AND NOTICES

Under section 42 any required notice, or any act required to be done under law or any deed or grant, can be done by the Minister or his Deputy or any person acting under the authority of either of them.

WATER LOTS

Section 45, the Minister on his own can grant a lease or licence of occupation of any public lands covered with water and, with the approval of Cabinet, he can sell such lands. Both leases and sales, of course, are at such price, terms and conditions as he considers proper.

Section 45(a) goes on to note that subject to the approval of Cabinet the Minister in his discretion may fix the terms and conditions upon which water powers (?) or privileges (?) granted by the Crown and any public lands necessary for the development thereof may be leased or developed.

THE PROVINCIAL LAND TAX ACT

Land forfeited to the Crown under The Provincial Land Tax Act can be redirected to the owner at the time of forfeiture by the Minister under letters patent or to any person appearing to have had an interest at that time.

BEACH MANAGEMENT AGREEMENTS

Under section 47 the Minister and any municipality may enter into agreements respecting the control and management by the municipality of any public lands comprised of beaches or lands covered with water in the municipality or elsewhere (if the lands are in another municipality that municipality must consent). Such agreement may provide for the granting of leases by the municipality and the sharing of rents therefrom.

PUBLIC AGRICULTURAL LANDS COMMITTEE (PALC)

Under section 48 there shall be a PALC which is to recommend areas suitable for sale or other disposition for agricultural purposes and measures for their development: and to consider applications to acquire these lands for agricultural purposes in any such area. The Minister can designate lands recommended by the Committee as being suitable for disposition for agricultural purposes and set about to sell them or otherwise dispose of them at his own prices, rentals, and conditions. Section 48(5) notes that every agreement, licence and letters patent for lands sold or otherwise disposed of under this section shall contain a condition that the land is to be used for agricultural purposes.

LANDS ACQUIRED BY THE MINISTRY

Under section 49 the Minister can acquire land under The Public Works Act for any of its programs and such lands shall be deemed to be public lands within the meaning of this Act. The Minister or the Minister of Public Works can also enter into agreements with owners of lands for the erection, maintenance and operation thereon of a public work within the meaning of The Public Works Act. Such agreements may be registered on title and thereupon become binding upon every subsequent owner and mortgagee during the term of the agreement.

PART II-ROADS ON PUBLIC LANDS

Under section 51 any person can exercise a public right of passage on a road other than a private forest road. A private forest road is defined as a road occupied under the authority of a document issued under this Act or the regulations.

Under section 52 no civil action can be brought against the Crown or any person in respect of misfeasance, non-feasance or negligence in connection with the construction, maintenance, repair or closing of a road though this does not apply to an action based on contract between the parties to the action for the construction, maintenance or use of a road.

Under section 53 the Minister may designate a road other than a private forest road as a public forest road. The Regulations Act does not apply to a designated public forest road. (What does this mean?)

Under section 54 a district forester can use his discretion to close a public forest road for such period as he may determine to public travel by any class or classes of the public, with the exception of person hauling forest products. If he closes such a road, barriers must be erected at either end and at all intersections. The forester can grant a permit for travel on the road subject to such terms and conditions as he considers advisable. Anyone who travels on a closed road and has had reasonable opportunity of knowing that the road has been closed is subject to a fine of not more than $500.00.

Under section 56 a private forest road is not open to travel by the public unless the Minister has entered an agreement with the person who occupies the private forest road under the authority of a document issued under this Act or the regulations. The agreement can open the private forest road to travel by the public generally or to any class or classes of the public as may be agreed upon and such opening can include various terms and conditions. The agreement can provide for cost sharing of construction, reconstruction or maintenance of a private forest road. The road does not become a highway within the meaning of The Highway Traffic Act and the district forester can periodically close the road to travel by the public except for traffic hauling forest products.

PART III - PROVISIONS OF GENERAL APPLICATION

Section 58 relates to land sold prior to March 29, 1961.

TREES

Section 59 states that trees remain Crown property on land that has been disposed of for agricultural purposes until the issuance of letters patent, when they pass to the patentee. Note that section 59(4) states that a licence to cut timber is revoked

when the land is disposed of for agricultural purposes. (See section 23)

Section 60(2) & (3) states that a reservation of timber rights in letters patent granting lands disposed of for a summer resort location or dated before the 1st day of April, 1869, is void. Section 60(4) states that this is not true if a licence exists under The Crown Timber Act as of June 26, 1970.

Section 60(5) notes that where public lands are being disposed of by the Crown and some but not all species of trees thereon have been reserved to the Crown and are not under timber licence, the Minister may, if the lands comprise not more than 80 hectares, acquire any species of trees not so reserved or release any species of trees so reserved at such price and upon such terms and conditions as he considers proper. If the lands comprise more than 80 hectares, the Minister requires the approval of cabinet.

MINERAL RESERVES ON AGRICULTURAL LANDS

Section 62 states that "in any letters patent issued for lands located or sold under this Act for agricultural purposes on or before the 1st day of April, 1957, the mines and minerals shall be reserved to the Crown."

MINERAL RIGHTS PRIOR TO MAY 6, 1913

Under section 63 mineral rights are deemed to have passed to patentee in any letters patent prior to May 6, 1913, and any reservation in such letters patent or by statute is void. If the land was patented after that date the mineral rights passed to the patentee unless expressly reserved by the letters patent. The deemed passing of mineral rights prior to May, 1913 does not apply where the minerals were

alienated or disposed of under The Mining Act, or revert to the Crown through abandonment, cancellation, forfeiture or otherwise. Note that the Minister of Mines (not Natural Resources unless natural resources now includes Mines) may issue a certificate as to the issue of letters patent with respect to any lands, mines or minerals affected by this section. Such certificates shall be recorded in the proper registry office.

ORES TO BE TREATED IN CANADA

Under section 64 if the land is patented or otherwise disposed of after April 12, 1917 there is a condition that all ores or minerals raised or removed therefrom shall be treated and refined in Canada. Default results in reversion of the lands to the Crown. Cabinet can exempt any lands from this provision.

ROADS (Continued)

Under section 65 a beach used for public travel is not by reason thereof a highway within the meaning of any act.

Reservation of Surface Rights for Roads

Under section 66 every patent, etc., must contain a provision excepting the surface rights in any public or colonization road or highway crossing the land granted. The Minister of course may direct otherwise. Every patent, etc., shall reserve to the Crown such percentage, if any, of the surface rights of the land as the Minister considers necessary for road purposes. If there has been a reservation of a percentage of the land for road purposes and these rights have not been exercised prior to May 1, 1963, "the reservation shall be deemed to be a reservation of

the surface rights only" (what does this mean?).

Under section 67 the Crown reserves on any land patented, granted or otherwise disposed of (including mining lands or mining claims) the right to construct any colonization or other road. This right exists whether or not stated in the letters patent. No compensation is payable. The Crown also has the right to take area for roads, wood, gravel and other materials required for the construction or improvement of any colonization or other road without compensation therefore or for the injury done to the land from which they are taken. But if the letters patent do not include a reservation for this construction activity compensation is payable as provided by The Expropriations Act. *Note that "colonization road" is not defined.

PORTAGES

Under section 67(4) if Crown land is sold that includes a portage then anyone using the waterway can continue to use the portage without the permission of or payment to the owner of the lands. Any attempt to obstruct can result in a fine of not more than $100.00.

ROADS - RELEASE OF RESERVATIONS

Under section 68 if the Minister is satisfied that the locality is well served with roads he can make an order releasing and discharging land from any reservation relating to roads mentioned in section 67, upon application of the owner and upon payment of a $25.00 fee. This applies where the lands are in a municipality. Likewise the Minister can release a reservation of the right of

access to the shores of all rivers, streams and lakes for all vessels, boats and persons if the land is in a municipality and if he is of the opinion that the reservation no longer serves the useful purpose or that the release of the reservation is in the public interest. The owner must apply for this reservation and pay a $25.00 fee.

Such releases may be registered in the proper registry office.

RESERVATION OF WATER POWER

Under section 69 the Minister may reserve from sale any "water power or privilege" and such area of land in connection therewith as he considers necessary for the erection of buildings and plant and the development and utilization of power, together with rights to lay out and use roads necessary for passage to such "water power or privilege and land".

BUILDING CONDITIONS VOIDED ON SUMMER RESORT LANDS

Under section 70 letters patent granted for summer resort lands that are subject to conditions that the patentee shall spend not less than $300.00 for improvements within 18 months and that nothing can be built unless the plans have been approved by the Minister are void and of no effect.

CERTIFICATE re Reservations, etc.

Under section 71 the Minister may issue a certificate as to any condition, proviso or reservation that is void by statute and an applicant for such a certificate shall

pay a fee of $15.00.

RIGHT OF CROWN TO ONE-QUARTER OF LOTS (if subdivided within 5 yrs.)

Under section 72 if public lands are surveyed, subdivided and shown as lots on a plan that is to be deposited or registered under any act and the plan is signed by the owner within five years of the issue of the letters patent then one-quarter in area of all the lots shown on the plan becomes the property of the Crown and are public lands within the meaning of this Act upon the depositing, filing or registration of the plan. The Minister can choose his lots by agreement with the owner or he may first select one lot then the owner may select three lots and so on. Provision is made to allow the Minister to accept a money payment in lieu of one-quarter in area of all the lots on the plan. No plan can be deposited until the Minister has approved it and he may impose such conditions as in his opinion are advisable.

PART IV - CONSTRUCTION OF DAMS

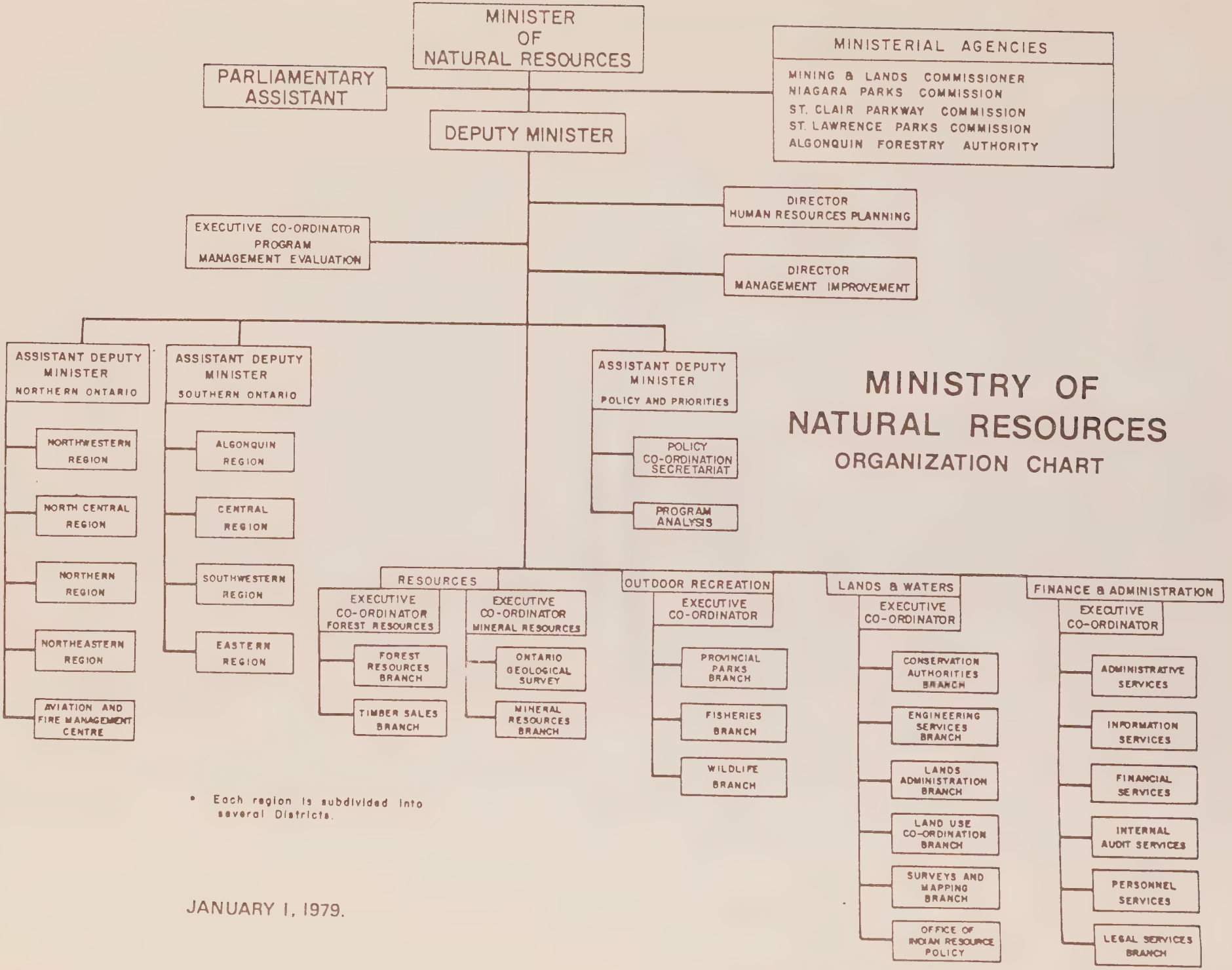
This part allows the Minister to design, construct, maintain, manage and administer dams. Land or any interest therein may be acquired or expropriated and in the event of emergency, as declared by Cabinet, respecting the safety of persons or the protection of public or private property, the Minister or any person authorized by him may, without the consent of the owner, enter upon and use any land, alter any natural or artificial feature of any land, construct and use roads on it, construct and use all necessary sidings, water pipes, conduits or tracks on it, or place or remove from any land any substance or structure. This can be done immediately notwithstanding

any provision of The Expropriation Act and the owner of the land is entitled to compensation in a matter provided in that Act.

APPENDIX F

MINISTRY OF NATURAL RESOURCES

ORGANIZATIONAL CHARTS

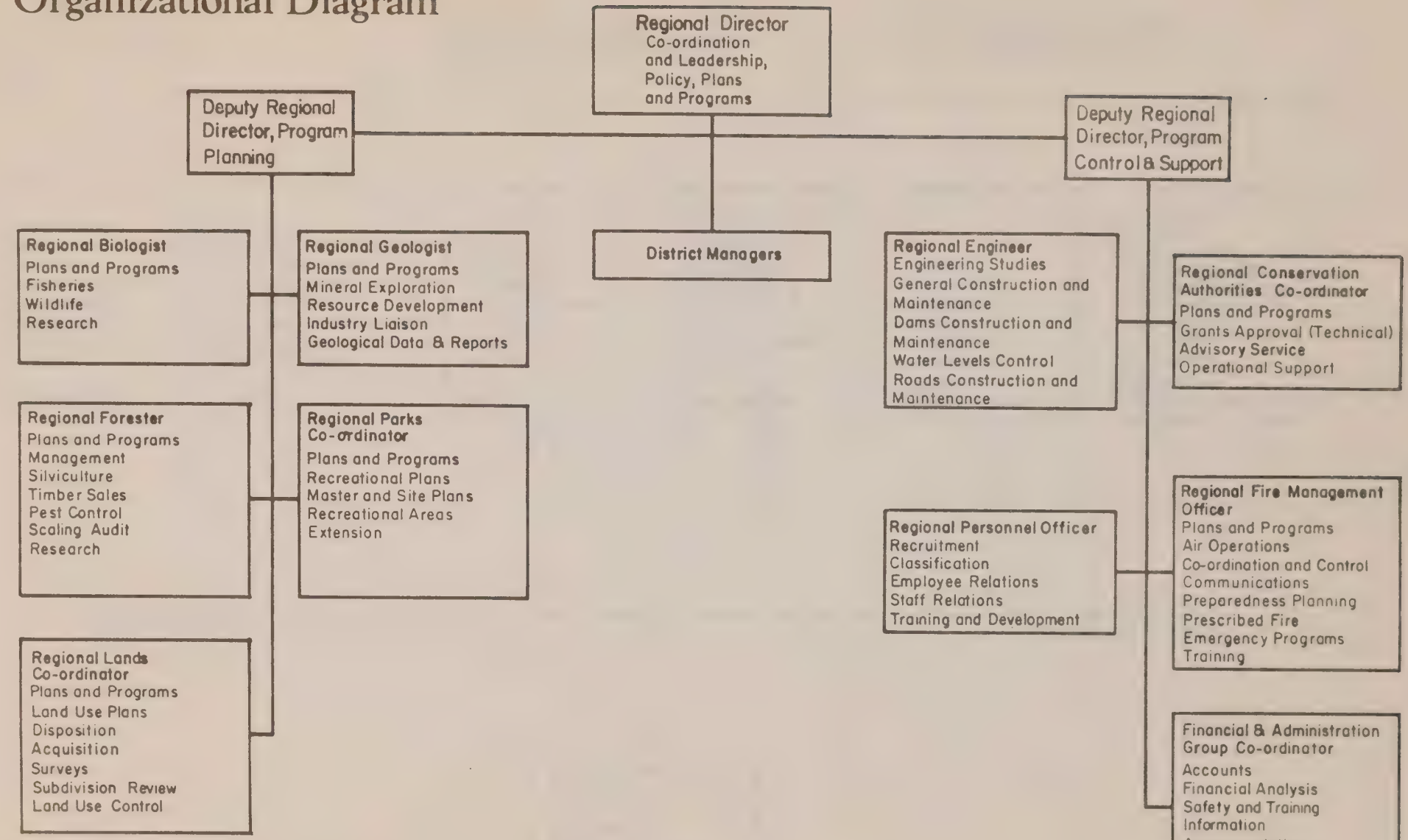


MINISTRY OF NATURAL RESOURCES
ORGANIZATION CHART

* Each region is subdivided into several Districts.

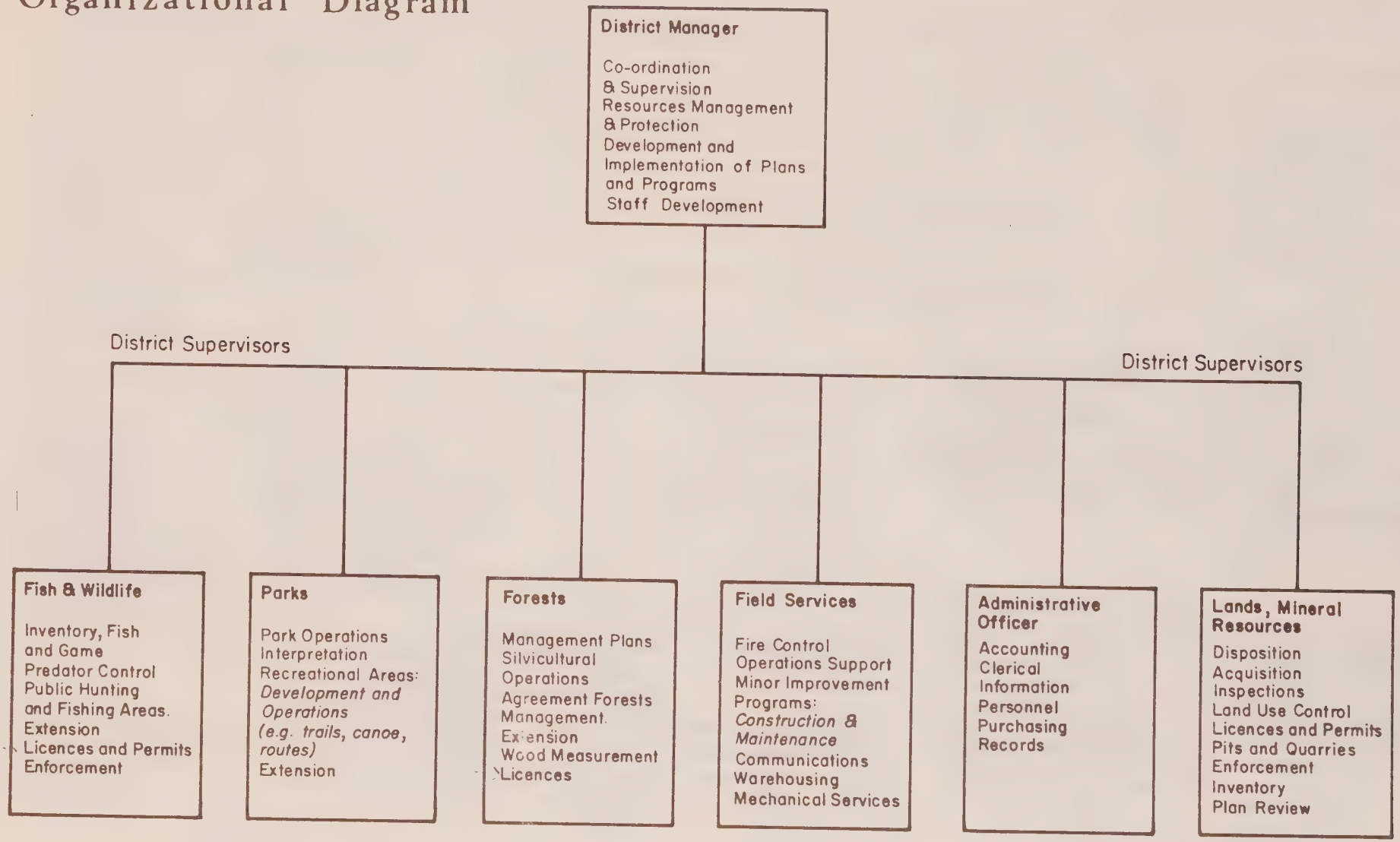
JANUARY 1, 1979.

Typical Regional Organizational Diagram



Note:
Chart illustrates key functions, not specific staffing.
Functions may not occur in all regions.
Functions may be combined depending on workload, or re-allocated

Typical District Organizational Diagram



Note
Chart Illustrates key functions, not specific staffing.

Functions may not occur in all districts. Functions may be combined or separated, depending on workload, or re-allocated.

Enforcement may be organized to serve multi-functional requirements i.e. parks, lands, fire, fish and wildlife, forests.

APPENDIX C

DEFINITION OF TERMS 'UNINCORPORATED' and 'UNORGANIZED'

MEMORANDUM

Re: Definitions of 'Unincorporated' and 'Unorganized'

"Unorganized territory" is defined in the Territorial Division Act as territory without either county, metropolitan, regional, or district organization.

The Ministry of Housing has its own meaning for the word "unorganized territory". MOH uses it to mean territory that has no municipal structure, that is territory that is not incorporated.

"Unincorporated Territory" are defined in the Municipal Act as being those communities which are not incorporated into townships, villages, or towns etc., by the Ontario Municipal Board.

Both the Municipal Act and the Territorial Divisions Act are administered by MIA.

Unincorporated Territory

The power to incorporate municipalities is given to the Ontario Municipal Board under The Municipal Act. Sections 10 to 12, and in particular section 12(1) gives to the Municipal Board the power to entertain applications from inhabitants of a locality for incorporation into either townships, villages, improvements districts or towns.

Paragraph 17(1) of The Municipal Act defines 'municipality' to mean a locality, the inhabitants of which are incorporated. Therefore where any incorporation has taken place under The Municipal Act a municipal corporation has been created.

The municipal structures set up in The Municipal Act are available in unorganized territory. For example, in section 29(1), The Municipal Act provides that the Council of the town in unorganized territory shall be composed of a mayor and six councillors to be elected by general vote.

Unorganized Territory

1. Ministry of Intergovernmental Affairs

The Territorial Division Act

The TDA is administered by the Ministry of Intergovernmental affairs, and sets out those areas of Ontario which are divided into counties, districts and metropolitan and regional areas.

All areas of Ontario which are not so divided are inferentially defined as unorganized territory for the purposes of MIA. (From a telephone call to Mr. Stepinac (965-6926) of the Legal Department of MIA).

This definition covers all uses of the term "unorganized territory" in the county sense. (See Municipal Act)

2. Ministry of Housing

The Ministry of Housing uses the term "unorganized territory" to refer to any land in Ontario which has not been incorporated pursuant to the Municipal Act. (From a telephone

call to Mr. LeMesurier (965-9849) of the Legal Department of the Ministry of Housing)

They are concered with the existence or non-existence of a municipality rather than a territorial division because of their mandate to supply services. For example the Ministry of Housing will periodically enter into agreements with developers to supply municipal-type services to an area without municipal organization.

Since municipalities can be erected in areas that are without county organization the MIA definition for "unorganized territory is of no importance to MOH."

3. Other Ministries

Other ministries may have their own definition for "unorganized territory" therefore it will be necessary to clearly comprehend the usage of the term in any further research that is done.

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